(1)

Supreme Court, U.S.
FILED

JUL 02 2001

OFFICE OF THE CLERK

No. 01-26

IN THE

Supreme Court of the United States

DAVID SMITH,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

---

PETITION FOR WRIT OF CERTIORARI

STEVEN F. MOLO
Counsel of Record
ILENE L. BLOOM
WINSTON & STRAWN
35 West Wacker
Chicago, IL 60601-9703
(312) 558-5600

Counsel for Petitioner

MARSHALL J. HARTMAN
Capital Litigation
DIVISION OF ILLINOIS STATE
APPELLATE DEFENDERS OFFICE
600 W. Jackson Blvd.,
Sixth Floor
Chicago, IL 60661

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

164 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was deprived of effective assistance of counsel, in violation of the Sixth Amendment, based upon counsel's failure to pursue a challenge to the Illinois Death Penalty Statute—which grants Illinois prosecutors virtually unfettered discretion in seeking a death sentence once basic criteria are met and thereby authorizes arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

2. Whether the Illinois Post Conviction Statute and its application to petitioner by the Supreme Court of Illinois violates the Eighth and Fourteenth Amendments in failing to allow meaningful review of constitutional claims.

3. Whether petitioner was deprived of effective assistance of counsel at trial, resentencing and on appeal, in violation of the Sixth Amendment, based upon counsel's failure to introduce certain exculpatory and mitigating evidence.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
I. NATURE OF THE CASE	1
II. FACTS PRESENTED TO THE TRIAL COURT	3
A. The Guilt Phase	3
B. The Resentencing Hearing	5
1. Eligibility Phase	5
2. Penalty Phase	5
a. Aggravation	5
b. Mitigation	6
(i) Stipulated Prior Testimony	6
(ii) New Testimony Presented at the Resentencing Hearing	7
III. NEW FACTS PRESENTED IN THE AMENDED PETITION FOR POST-CONVICTION RELIEF	8
A. Evidence Regarding Petitioner's Childhood and Adolescence	8
1. Petitioner's Early Childhood	8
2. Petitioner's Life With His Father and Abusive Stepmother	9

TABLE OF CONTENTS—Continued

Page

3. Petitioner's Delinquency and Adolescent Drug Use 9

4. Effects on Petitioner's Neurological and Emotional Development 10

B. Evidence Regarding Events Preceding Arrest 11

1. Alcohol and PCP Use 11

2. Petitioner's Alleged Statement of "I did it" 11

C. Evidence Relating to Events at the Police Station 11

1. Coercion of Testimony 12

2. Evidence of Mental or Emotional Disturbance at Police Station 12

D. Evidence Relating to Petitioner's Positive Behavior During Incarceration 13

IV. POST-CONVICTION PROCEEDING BEFORE THE CIRCUIT COURT 13

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI 14

1. This Court Should Grant a Writ of Certiorari to Resolve the Question of Whether a Death Penalty Statute Lacking Clear Objective Criteria and Safeguards for Its Consistent Application Violates the Eighth and Fourteenth Amendments 14

2. This Court Should Grant a Writ of Certiorari to Establish Clear Standards for the Process Due Under Post-Conviction Proceedings in Which Constitutional Claims Have Been Raised 20

TABLE OF CONTENTS—Continued

	Page
3. This Court Should Grant a Writ of Certiorari Because the Supreme Court of Illinois Erroneously Applied the *Strickland* Standard in Concluding Petitioner Received Effective Assistance of Counsel at the Guilt-Innocence Phase	24
A. Statement at Police Station	24
B. Statement at Petitioner's Home	25
4. This Court Should Grant a Writ of Certiorari Because the Supreme Court of Illinois Erroneously Applied the *Strickland* Standard in Concluding that the Petitioner Received Effective Assistance of Counsel at the Resentencing Phase	26
A. Failure to Demonstrate Petitioner's Extreme Emotional and Mental Disturbance Through Competent Evidence Regarding Drug Abuse	27
B. Failure to Present a Complete Picture of Family History and Background	29
C. Failure to Rebut Aggravating Evidence of Petitioner's Conduct While in Prison	30
CONCLUSION	30
APPENDIX	
A: *Illinois v. Smith*, 152 Ill. 2d 229, 604 N.E.2d 858 (1992)	1a
B: *Illinois v. Smith*, 176 Ill. 2d 217, 680 N.E.2d 291 (1997)	40a
C: *Smith v. Illinois*, 522 U.S. 920 (1997)	80a

TABLE OF CONTENTS—Continued

		Page
D:	*Illinois v. Smith*, 195 Ill. 2d 179, 745 N.E.2d 1194 (2000)	81a
E:	*Illinois v. Smith*, No. 86775 (April 2, 2001)	108a
F:	*Illinois v. Smith*, No. 86775 (April 17, 2001)	109a
G:	Constitutional and Statutory Provisions	110a

TABLE OF AUTHORITIES

CASES

	Page
Arizona v. Fulmunante, 499 U.S. 279 (1991)	26
Bruton v. United States, 391 U.S. 123 (1968)	26
Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525 (2000)	17, 18, 19
Carey v. Cousins, 77 Ill. 2d 531, 397 N.E.2d 809 (1979)	15, 19
Furman v. Georgia, 408 U.S. 238 (1972)	16
Godfrey v. Georgia, 446 U.S. 420 (1980)	16
Gregg v. Georgia, 428 U.S. 153 (1976)	16, 17
Harris v. Alabama, 513 U.S. 504 (1995)	16
Illinois v. Coleman, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998)	21, 22
Illinois v. Free, 94 Ill. 2d 378, 447 N.E.2d 218 (1983)	28
Illinois v. Kitchen, 189 Ill. 2d 424, 727 N.E.2d 189 (2000)	21, 23
Illinois v. Morgan, 187 Ill. 2d 500, 719 N.E.2d 681 (1999)	29
Illinois v. Perez, 148 Ill. 2d 168, 592 N.E.2d 984 (1992)	29
Illinois v. Smith, 152 Ill. 2d 229, 604 N.E.2d 858 (1992)	1, 2, 3
Illinois v. Smith, 176 Ill. 2d 217, 680 N.E.2d 291 (1997)	1, 2, 3
Illinois v. Smith, 195 Ill. 2d 179, 745 N.E.2d 1194 (2000)	*passim*
Illinois v. Williams, 193 Ill. 2d 306, 739 N.E.2d 455 (2000)	17
Illinois v. Wright III, Ill. 2d 18, 488 N.E.2d 973 (1986)	28
Lockett v. Ohio, 438 U.S. 586 (1978)	16
Mohasco Corp. v. Silver, 447 U.S. 807 (1980)	23
Proffitt v. Florida, 428 U.S. 242 (1976)	16
Service v. Dulles, 354 U.S. 363 (1957)	22

TABLE OF AUTHORITIES—Continued

Page

Silagy v. Peters, 713 F. Supp. 1246 (C.D. Ill. 1989), *rev'd*, 905 F.2d 986 (7th Cir. 1990)..... 17
Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990) 17
Smith v. Illinois, 522 U.S. 920 (1997)..... 3
Strickland v. Washington, 466 U.S. 668 (1984).....20, 26, 30
Williams v. Taylor, 529 U.S. 362, 120 St.Ct. 1495 (2000)..... 29

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. 1257(a) 1
U.S. CONST. amend. V 25
U.S. CONST. amend. VI 26
U.S. CONST. amend. VIII ..... *passim*
U.S. CONST. amend XIV ..... *passim*
720 Ill. Comp. Stat. Ann. 5/9-1..... *passim*
725 Ill. Comp. Stat. Ann. 5/122-1..... 21, 22

LAW REVIEW ARTICLE

Leigh B. Bienen, *ABA's Proposed Moratorium: The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 Law & Contemp. Probs. 193 (1998)..... 19

OPINIONS BELOW

The opinion and order of the Supreme Court of Illinois affirming petitioner's conviction and vacating his sentence is reported at 152 Ill. 2d 229, 604 N.E.2d 858 (1992) and set forth in the Appendix hereto at A. The opinion of the Supreme Court of Illinois affirming petitioner's re-sentencing is reported at 176 Ill. 2d 217, 680 N.E.2d 291 (1997) and set forth in the Appendix hereto at B. The opinion of the Supreme Court of Illinois affirming the dismissal of petitioner's petition for post-conviction relief is reported at 195 Ill. 2d 179, 745 N.E.2d 1194 (2000) and set forth in the Appendix hereto at D. The order of the Supreme Court of Illinois denying petitioner's timely petition for rehearing is unreported and set forth in the Appendix at E.

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Illinois entered its judgment on December 1, 2000. The Supreme Court of Illinois denied petitioner's timely petition for rehearing on April 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All relevant constitutional and statutory provisions are reproduced in the Appendix at G.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

A man stands condemned to die. Petitioner, David Smith, was charged with murder and other offenses in connection with the March 17, 1987 death of Lisa Ferguson. Pursuant to 720 Ill. Comp. Stat. Ann. 5/9-1(d) (West 1993 & Supp. 1998) (Appendix at G), a county prosecutor independently sought and obtained the death penalty.

A prosecutor may request a sentencing hearing for the purpose of imposing the death penalty only for defendants over the age of eighteen who are accused of first-degree murder. *Id.* § 9-1(b)-(d). In each of the 102 counties in Illinois, the county prosecutor is given total discretion to decide for which death eligible defendants he will request a capital sentencing hearing. *Id.* Where such a hearing is requested, and after a finding of guilt and consideration of statutory aggravating and mitigating factors, a jury or judge may sentence a defendant to death. *Id.* Where a prosecutor does not request such a hearing in a death eligible case, the presiding judge or jury has no authority to impose the penalty of death on a defendant. *Id.* § 9-1(d).

On January 11, 1989, petitioner was found guilty of murder, home invasion, and aggravated criminal sexual assault. Two days later, petitioner was sentenced to death.

On October 15, 1992, the Illinois Supreme Court issued its opinion in the direct appeal, affirming petitioner's conviction. *Illinois v. Smith*, 152 Ill. 2d 229, 274, 604 N.E.2d 858, 877 (1992) (Appendix at A). However, it vacated the death sentence and remanded for a new sentencing hearing for failure to life-qualify the jury. *Id.* On March 21, 1994, petitioner was again sentenced to death. Mr. Smith again appealed.

While awaiting the Illinois Supreme Court's opinion regarding his second sentence of death, in order to preserve his rights under the ever-changing Illinois Post-Conviction Hearing Act, petitioner filed a *pro se* petition for post-conviction relief on December 21, 1995. On January 26, 1996, counsel was appointed to represent petitioner. On February 9, 1996, the State filed a Motion to Dismiss petitioner's *pro se* petition for post-conviction relief. Meanwhile, the Illinois Supreme Court affirmed petitioner's second capital sentence and denied a Petition for Rehearing. *Illinois v. Smith*, 176 Ill. 2d 217, 261, 680 N.E.2d 291, 314

(1997) (Appendix at B). This Court denied Mr. Smith's petition for a writ of *certiorari* on October 14, 1997. *Smith v. Illinois*, 522 U.S. 920 (1997) (Appendix at C).

After filing a *pro se* petition for post-conviction relief, appointed counsel sought an evidentiary hearing on an amended petition, based *inter alia*, on a substantial showing of violations of constitutional rights, including ineffective assistance of counsel at trial, sentencing, and on appeal, and a challenge to the constitutionality of the Illinois Death Penalty Statute under the Eighth and Fourteenth Amendments. The trial court failed to consider the post-conviction claims relating to the guilt-innocence stage of his trial because it found that the claims were either waived or barred. It also concluded that the sentencing claims were barred by the doctrine of *res judicata*. The Illinois Supreme Court found that these claims should have been considered by the trial court. *Illinois v. Smith*, 195 Ill. 2d 179, 207-08, 745 N.E.2d 1194, 1210-11 (2000) (Appendix at D). However, reviewing the trial court's decision *de novo*, the court held that an evidentiary hearing was unnecessary. On April 2, 2001, the Illinois Supreme Court summarily denied petitioner's final plea for rehearing. (Appendix at E.) [1]

II. FACTS PRESENTED TO THE TRIAL COURT

A. The Guilt Phase

Detailed discussions of the facts are found in the previous published opinions in this case at *Illinois v. Smith*, 152 Ill. 2d 229, 604 N.E.2d 858 (1992) (Appendix at A) and *Illinois v. Smith*, 176 Ill. 2d 217, 680 N.E.2d 291 (1997) (Appendix at B). However, certain facts relevant to this proceeding are set forth below.

---

[1] On April 17, 2001, the Illinois Supreme Court granted petitioner's motion to stay mandate of execution pending appeal or application for writ of *certiorari*. (Appendix at F.)

Juanita Soto testified that she was the victim Lisa Ferguson's aunt, and was living with her at 3122 S. Union in Chicago. (R. 521) [2] On March 17, 1987, she went to meet her boyfriend at Bucko's Bar where she saw petitioner appear intoxicated. (R. 530-46)

That evening, police responded to a radio call of a fight in progress at 3122 South Union and found the body of a white female and a four-year-old girl in the apartment who told the police that a man named "David", her father's friend, had been in the apartment that evening. The police proceeded to the home of petitioner, David Smith.

Upon arriving, the police heard an argument in the basement apartment between a male and a female, with a male voice saying "I saw someone get killed tonight," followed by the statement, "I did it." (R. 720-722) After the officers knocked on the door of the basement apartment, and the male identified himself as petitioner, they arrested him. (R. 722-723) However, the police report prepared in connection with the arrest fails to include this statement. (R. 740) [3]

At approximately 1:00 a.m. on March 18, 1987, petitioner made an oral statement concerning the Ferguson homicide to a detective. (R. 879) A prosecutor then composed a handwritten statement, which petitioner signed. (R. 891-894)

Rose Palomino testified for the defense that, on the night of March 17, 1987, she and her daughter Josephine, petitioner's girlfriend, went to the police station at 39th Street and California. (R. 935) She heard petitioner "yelling for Josie,

---

[2] Citations to the record will be as follows: "R" and "R.S." refer to the common law record of petitioner's trial and resentencing hearing. "C" refers to the common law record of the post-conviction proceedings.

[3] At the time of his arrest, Officer Lukensmeyer found a pair of jeans and thermal underwear in a laundry wash basin in petitioner's apartment. There was human blood on the thermal underwear. No blood was found on the jeans. (R. 742)

calling her name, [and screaming] let me see Josie, let me see Josie." (R. 943) Rose Palomino also heard petitioner say, "Get your fucking hands off me." (R. 944) She further heard him say, "I just want to see Josie, for God sakes, let me see Josie," and testified that Smith was yelling and calling for help. (R. 946-947)

The jury found petitioner guilty of murder, home invasion, and aggravated criminal sexual assault. (R. 1045) The same jury imposed the death penalty. The Illinois Supreme Court affirmed petitioner's conviction, but vacated the death sentence.

B. The Resentencing Hearing

Petitioner waived his right to be re-sentenced by a jury. (R.S. 46-47) At the resentencing hearing, the following key evidence was introduced:

1. *Eligibility Phase*

The court took judicial notice of the fact that petitioner was over the age of 18 at the time of the murder and that the jury convicted petitioner of murder, home invasion and aggravated criminal sexual assault, and on that basis to find him eligible for the death penalty. (R.S. 50-51)

2. *Penalty Phase*

a. Aggravation

During the penalty phase of the resentencing hearing, the State presented many of the same witnesses they had presented at trial. (R.S. 60-100)

Brian Upchurch, an officer with the Illinois Department of Corrections assigned to the Condemned Unit at Pontiac Correctional Center, testified that, on November 11, 1992, petitioner threw hot water on him as he walked past petitioner's cell. (R.S. 131-133) Upchurch did not suffer any permanent disability. (R.S. 144)

Jill Beatty testified she was an Officer with the Illinois Department of Corrections previously assigned to the Condemned Unit at Pontiac. (R.S. 145-146) She testified that on January 2, 1990, she found a television antenna, considered to be a shank, in petitioner's cell during a routine shakedown. (R.S. 146-148)

b. Mitigation

(i) *Stipulated Prior Testimony*

Tim Martin testified that he is employed by the Cook County Sheriff's Office and that he supervises inmates at Cook County jail. (R. 1133-1134). For 18 months, beginning in May of 1987, petitioner was one of his volunteer workers on the wing. (R. 1136-1137) Mr. Martin testified regarding petitioner's good behavior during the 18 months that he was assigned to supervise petitioner's wing. (R. 1137-1139) He testified that petitioner would succeed in an institutionalized setting and that he would not be a danger to other inmates. (R. 1144)

James Smith, petitioner's younger brother, testified regarding their broken family life, petitioner's habitual drug use, and petitioner's criminal activity when they were juveniles. (R. 1180-1212) He stated that while living in Arizona with their father, they would run away and steal things. (R. 1192-1194) James Smith also testified that when living in Arizona, petitioner had started using marijuana and may have tried acid (LSD). (R. 1193, R. 1199) When he saw petitioner again in Chicago, Illinois, in 1980, petitioner's drug use had expanded to acid (LSD), PCP, uppers, downers, and alcohol. (R. 1199-1201)

Josephine Palomino testified that she and petitioner started living together in June of 1986 and that they have a son named David who was born on April 16, 1987. (R. 1223) She testified about her knowledge of petitioner's troubled childhood and past drug use. (R. 1215-1239)

(ii) *New Testimony Presented at the Resentencing Hearing*

Josephine Palomino testified again at the resentencing hearing. (R.S. 249-260) She testified that the relationship that has developed between petitioner and their son is very strong. (R.S. 254) Josephine Palomino testified that petitioner's execution would devastate her son. (R.S. 256)

Dr. Lawrence Heinrich, a licensed clinical psychologist, testified that he was asked to evaluate petitioner to determine whether there was any mental condition that might constitute mitigation. (R.S. 264) He reviewed numerous documents and interviewed petitioner, Josephine Palomino, and Rose Palomino. (R.S. 264) Dr. Heinrich also administered four psychological tests and concluded that petitioner suffers from long-standing emotional and personality deficiencies, the most prominent of which were a borderline personality disorder and schizotypal personality disorder. (R.S. 268) Dr. Heinrich testified that these deficiencies, exacerbated by drug and alcohol abuse, severely impaired petitioner's judgment and ability to control his behavior at the time of the victim's death. (R.S. 273)

Dr. George Savarese, a licensed clinical social worker, testified that he was asked to compile a comprehensive psychosocial developmental history of petitioner. (R.S. 299) He reviewed various records and interviewed petitioner and others. (R.S. 299-301) Savarese, like Heinrich, concluded that petitioner suffers from a borderline personality disorder with schizotypal features. (R.S. 304) He testified these disorders were the result of a dysfunctional developmental history. (R.S. 326) Savarese testified that it was his professional opinion that, as a result of petitioner's personality disorders, in addition to his alcohol and substance abuse, petitioner could have slipped into a transient psychotic state on the night of the offense. (R.S. 330-331) Dr. Savarese testified that at the time of the offense petitioner was

suffering from an extreme mental and emotional disturbance which substantially impaired his ability to conform his behavior to the requirements of the law.

The court found that petitioner was not acting under the influence of an extreme mental or emotional disturbance at the time of the offense involving Lisa Ferguson, and also that there were no mitigating circumstances or factors sufficient to preclude imposition of the death sentence. (R.S. 464)

III. NEW FACTS PRESENTED IN THE AMENDED PETITION FOR POST- CONVICTION RELIEF

Petitioner filed his original petition for post-conviction relief on December 21, 1995, and his amended petition for post-conviction relief on December 5, 1997. In his amended post-conviction petition, petitioner brought nine claims which were supported by affidavits which contained significant *new evidence not produced at the original trial or resentencing.*

A. Evidence Regarding Petitioner's Childhood and Adolescence

1. *Petitioner's Early Childhood*

Petitioner's infancy, childhood, and adolescence were marked by developmental neglect, social and familial turmoil, environmental chaos, along with significant and habitual drug and alcohol dependence. These factors had devastating consequences for petitioner's neurological, social, and emotional development.

Petitioner's father had a severe drinking habit and was often absent. (C. 199, 202) His mother was often suicidal. (C. 200) His parents separated and his mother entrusted petitioner and his five siblings, who were between the ages of 2 and 11 years old, to a 16-year-old babysitter. (C. 199, 207) His mother neglected the children, leaving them to fend for

themselves in a small apartment with no beds or furniture. They did not eat well and were not clean. (C. 207, 212)

2. *Petitioner's Life With His Father and Abusive Stepmother*

Petitioner's father moved the children to Arizona without their mother's knowledge. The children boarded a bus in the middle of the night to go to their father's house, where the children had no clothes or furniture. (C. 203, 212) The household included nine children in the combined family of petitioner's father and stepmother. Life with his father and stepmother included discipline by beatings. (C. 212, 217) All of the children, including the teenagers, were forced to take baths together and were not allowed to speak at dinner. (C. 207) Petitioner and his brother once ran away and lived at the airport for a few days. (C. 213) When petitioner was ten years old, he engaged in a sexual relationship with his eighteen-year-old babysitter. (C. 220)

3. *Petitioner's Delinquency and Adolescent Drug Use*

Petitioner's delinquent conduct resulted in juvenile detention at age 13. (C. 204) At 15, the juvenile court sent him to live with his 19-year-old brother who introduced petitioner to numerous illicit drugs including marijuana and PCP. (C. 217, 220)

Upon moving back to Chicago, petitioner met Manuel Ramirez and Efren Ramirez with whom he smoked marijuana everyday. The friends snorted cocaine on weekends and used PCP weekly. They often did three to four hits of acid at a time. (C. 225, 228) During this time, he did get violent once when he was on PCP, grabbing his girlfriend around the neck. (C. 225)

At the age of 17, the night before he left for the army, his mother threw a party for him at which she furnished PCP, alcohol, and marijuana. (C. 209, 214) Petitioner's mother's

boyfriend also used PCP heavily. (C. 209) From time to time, his mother made them "pot brownies." (C. 214) From the time that petitioner was discharged from the army until the time of the offense, he continued to be a heavy and habitual drug user. This drug use included PCP, cocaine, marijuana, heroin, and LSD. (C. 208, 214, 225-26, 228-29, 232-33, 253) He used cocaine at least once a week and smoked marijuana every day. (C. 233)

4. *Effects on Petitioner's Neurological and Emotional Development*

A post-conviction psychiatric report on petitioner's mental and emotional well-being was prepared by Dr. Bruce Perry, M.D., Ph.D. Dr. Perry is Chief of Psychiatry at Texas Children's Hospital and a professor in psychiatry and behavioral sciences at Baylor College of Medicine in Houston, Texas. Significantly, he has his M.D. and Ph.D. in neuropharmacology. (C. 284) This meant he offered a scientific expertise not otherwise considered by the trial court.

Based on his findings, Dr. Perry, the neuropharmacologist, concluded that petitioner's judgment was severely impaired at the time of Lisa Ferguson's death. Dr. Perry would have testified that the neglect and abuse during petitioner's formative years influenced the development of his brain. (C. 326) Because his brain was in a state of fear-related and stress-mediated activation, his brain led to increased anxiety and behavioral impulsivity. *Id.*

Dr. Perry's affidavit addressed the specific effects of PCP on the brain and behavior. (C. 326-27) Dr. Perry testified that long-term users of PCP are said to be "crystallized"—a syndrome characterized by dulled thinking, decreased reflexes, loss of memory, loss of impulse control, depression, lethargy, and impaired concentration. *Id.* Short-term PCP intoxication can have potentially severe complications and often are considered a psychiatric emergency. *Id.*

Petitioner's mental disorders, exacerbated by his use of alcohol and PCP preceding the offense, led petitioner to be completely out of touch with reality. *Id.* In essence, he was operating under a condition of extreme mental disturbance. (C. 325-26)

A. Evidence Regarding Events Preceding Arrest

1. *Alcohol and PCP Use*

Petitioner's friends, Manuel, Efren, and Edward Ramirez provided post-conviction affidavits that, on the day of the offense, they had been drinking with petitioner all day. He drank two pitchers of beer and two shots of tequila at Bucko's tavern. (C. 229) Earlier that day, they had been to three or four other bars. (C. 226) They had also smoked marijuana laced with PCP. (C. 226, 229) Defense counsel did not speak with all of these individuals and they were not asked to testify. (C. 226, 230, 233) Josephine Palomino has also given sworn testimony that when petitioner returned to his apartment on the night of the offense at 8:10 p.m., his eyes were glassy, red, and puffy. She testified that he was "pretty gone." (C. 222)

2. *Petitioner's Alleged Statement of "I did it"*

The police have testified that, upon entering petitioner's apartment the day of the offense, they heard him stating, "I did it," allegedly referring to the murder of Lisa Ferguson. However, Josephine Palomino, the only other person in petitioner's apartment when he supposedly admitted to committing the crime, has given sworn testimony in an affidavit that he never stated "I did it" or otherwise admitted to the offense. (C. 222)

B. Evidence Relating to Events at the Police Station

Petitioner alleged that his confession was coerced. Post-conviction affidavits of several witnesses support this claim.

1. *Coercion of Testimony*

Petitioner provided a post-conviction affidavit stating that the investigating officers refused to allow him to rest or use the bathroom until he confessed to the murder of Lisa Ferguson. (C. 281-82) Petitioner was also taken handcuffed to another room where Anthony Ramirez, the original suspect and ex-boyfriend of the victim, was sitting. *Id.* Mr. Ramirez cussed at petitioner and began to attack him. *Id.* Petitioner was told that if he did not cooperate with the police, he would be left alone with Mr. Ramirez. (C. 282) One of the interrogating officers then hit petitioner a few times on the side of his head and threatened him further. *Id.* Petitioner was forced to take off his clothes and was told that if he confessed to the crime, the judge may be more lenient in sentencing. (C. 281-82) Finally, after being told that he would not be able to see his girlfriend, Josephine, until he confessed, petitioner gave his statement as a detective told him exactly how the crime occurred. (C. 282)

2. Evidence of Mental or Emotional Disturbance at Police Station

In their affidavits, Manuel, Efren, and Edward Ramirez have also stated that petitioner was under the influence of alcohol, marijuana, and PCP at the time of his statements at the police station. (C. 226, 229, 233) As stated in an affidavit by neuropsychologist Dr. Bruce Perry, PCP is extremely hallucinogenic and can cause a "psychiatric emergency." (C. 326) After PCP use, a user may lose his memory, lose impulse control, become depressed, and unable to concentrate. *Id.* These short term effects can last up-to six hours. (C. 327) Petitioner was under the influence of PCP at the time he was at the police station. This intoxication can render a waiver of *Miranda* rights ineffective, thus making any confession invalid in a court of law.

D. Evidence Relating to Petitioner's Positive Behavior During Incarceration

Several people who knew petitioner during his incarceration have given sworn testimony regarding his positive behavior during his incarceration, but were not called to testify at the resentencing hearing to rebut the State's aggravation on this subject.

In his affidavit, Charles Margherio, an employee with the Illinois Department of Corrections for ten years, testified to petitioner's positive behavior during his incarceration. (C. 329) Also, Lieutenant Robert Ellinger, an employee of the Illinois Department of Corrections for fifteen years, testified to petitioner's positive behavior during his incarceration. (C. 331) Lt. Ellinger was in charge of the Condemned Unit at Pontiac Correctional Center for two years while petitioner was an inmate. *Id.*

IV. POST-CONVICTION PROCEEDINGS BEFORE THE CIRCUIT COURT

On September 11, 1998, the circuit court dismissed Mr. Smith's petition in its entirety, without holding an evidentiary hearing. The court held, in pertinent part:

> "[W]ell, first of all, claims 1 through 10, I think this is in the nature of. . . alleged ineffective assistance of counsel at the trial. Most respectfully, we feel that those claims are waived for several reasons. Number one, they were or could have been raised on appeal; and number two, if they were not raised—if they were raised and decided, that is *res judicata*. But furthermore, we feel that . . . what is before the court, before me at this point, properly before me on the post-conviction petition is the resentencing hearing and *not* the guilt-innocence phase.
>
> Now claims, 1 through 10, may be and I would have to review it, may be regarding the claims of ineffective assistance of counsel at the resentencing hearing. Clearly, those are properly before the court. However,

> those are points which were or could have been raised to the Supreme Court when the resentencing hearing was appealed and the decision of that was appealed and therefore it is our position that those points are waived.
>
> There are several points which are raised . . . challenging the constitutionality of the death penalty statute. . . . Those were or could have been raised initially back in—after the '89 sentencing, and we do not feel that those are properly brought at this point . . . .
>
> Lastly, I think lastly, the petitioner has raised the ineffective assistance of appellate counsel. We have had an opportunity to review those claims. We considered those claims. We also considered the State's motion to dismiss and which addresses those claims and we find that their motion has merit.

(Report of Proceedings from Hearing on Motion to Dismiss, p. 36-37.) The petitioner filed a Motion for Reconsideration which was heard and dismissed on November 11, 1998.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO RESOLVE THE QUESTION OF WHETHER A DEATH PENALTY STATUTE LACKING CLEAR OBJECTIVE CRITERIA AND SAFEGUARDS FOR ITS CONSISTENT APPLICATION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

The Illinois Death Penalty Statute provides for its arbitrary and capricious application. It provides that the imposition of a death sentence may be considered only "[w]here requested by the State." 720 Ill. Comp. Stat. Ann. 5/9-1(d) (West 1993 & Supp. 1998) (Appendix G). The statute states:

> "Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the

> existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c)"

Id. § 9-1(d).

A prosecutor may request a sentencing hearing for the purpose of imposing the death penalty only for defendants over the age of eighteen who are accused of first-degree murder. *Id.* § 9-1(b)-(d). In each of the 102 counties in Illinois, the county prosecutor is given total discretion to decide for which death eligible defendants he will request a capital sentencing hearing. *Id.* Where such a hearing is requested, and after a finding of guilt and consideration of statutory aggravating and mitigating factors, a jury or judge may sentence a defendant to death. *Id.* Where a prosecutor does not request such a hearing in a death eligible case, the presiding judge or jury has no authority to impose the penalty of death on a defendant. *Id.* § 9-1(d). As one Illinois Supreme Court Justice aptly noted, this statutory scheme allows each of the 102 prosecutors to "establish his own policy as to when sentencing hearings [that is, the imposition of the death penalty] will be requested." *Carey v. Cousins*, 77 Ill. 2d 531, 557, 397 N.E.2d 809, 822 (1979) (J. Ryan, dissenting).

Because individual prosecutors are under no obligation to conform their approach to seeking death penalty sentencing hearings to any objective standard, whether such a hearing is requested for a particular defendant is dependent upon the philosophy, policy or whim of the prosecutor in the county where a crime is committed. As evidenced by the Illinois Supreme Court's opinion in this case, the court has no intention of overruling its prior rulings on the constitutionality of this structure. *Illinois v. Smith*, 195 Ill. 2d 179, 208-09, 745 N.E.2d 1194, 1211 (2000) (Appendix at D).

While imposing a sentence of death is not *per se* cruel and unusual under the Eighth Amendment or a denial of due

process or equal protection under the Fourteenth Amendment, *Proffitt v. Florida*, 428 U.S. 242, 247 (1976), imposing a sentence of death "arbitrarily or capriciously" violates the Constitution. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). *See also, Furman v. Georgia*, 408 U.S. 238 (1972); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Harris v. Alabama*, 513 U.S. 504 (1995) (applying Eighth and Fourteenth Amendment analysis to state death penalties).

This Court has recognized that the penalty of death is different in kind from any other punishment imposed under the criminal justice system. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). The unique finality and severity of the death penalty requires that the punishment be imposed only under sentencing procedures that safeguard against the risk of infliction in an arbitrary and capricious manner. *Gregg*, 428 U.S. at 189 (holding that statutes must be carefully crafted so as to "minimize the risk of wholly arbitrary and capricious action"). This Court has held that there must be clear factors guiding and justifying the decision to *impose* the death penalty. *See Godfrey*, 446 U.S. at 428; *Gregg*, 428 U.S. at 206 ("Left unguided, juries imposed the death sentence in a way that could only be called freakish").

Despite the strict standards required for the imposition of the death penalty, this Court has never repudiated a statute on the grounds that a prosecutor, in making the decision to *seek* the death penalty, must be guided by similarly strict standards. In fact, this Court has held that a state's statutory provision governing the administration of the death penalty is not rendered unconstitutional under the Eighth or Fourteenth Amendments merely because the state prosecutor has discretion in selecting cases to be prosecuted as capital

offenses or in plea bargaining.[4] *See Gregg*, 428 U.S. at 199 (noting that there is no requirement that prosecutors charge a capital offense in every case where there is an eligible defendant). However, the reasoning set forth in this Court's recent decision of *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525 (2000), demonstrates that review on this question is merited.

In *Bush*, this Court granted certiorari on the following question: "Whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate." 121 S. Ct. at 530. The Court analyzed this question under the Equal Protection Clause. *Id.* at 529-30. It held that although the State legislature's power to select the manner for appointing electors is plenary, having once granted the right, it was obliged to grant it equally. *Id. Bush* further held that the State may not by "arbitrary and disparate treatment, value one person's vote over that of another." *Id.*

Specifically, *Bush* held that because counties in Florida had different standards for manually recounting votes, the process did not have "sufficient guarantees of equal treatment." *Id.* at 530-31. This Court rejected the general standard set forth by the Florida Supreme Court, which commanded the vote counters to consider the "intent of the voter" because it lacked "specific standards to ensure its equal application." *Id.* at

---

[4] The constitutionality of the Illinois death penalty statute has been challenged in numerous state and federal court proceedings. *See, e.g., Silagy v. Peters*, 713 F. Supp. 1246 (C.D. Ill. 1989), *rev'd*, 905 F.2d 986 (7th Cir. 1990); *Illinois v. Williams*, 193 Ill. 2d 306, 739 N.E.2d 455 (2000).

In 1989, the prosecutorial discretion provision of the Illinois death penalty statute applicable here, 720 Ill. Comp. Stat. Ann 5/9-1(d), was held unconstitutional by a federal district court in the Central District of Illinois. *Silagy v. Peters*, 713 F Supp. 1246 (C.D. Ill. 1989). *Silagy*, however, was subsequently overturned by the Seventh Circuit, vacating the ruling as to the unconstitutionality of § 9(d). *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990).

530. In order for standards to be sufficient, this Court held that state-wide uniform and consistent rules to determine intent were required. *See id.* at 532.

Similarly, uniform and consistent rules must be required before a statute providing for capital punishment can be deemed constitutional. The lack of clear and consistent standards in Florida impermissibly left the rights of voters subject to the vagueness of statutory interpretation and practices of the county within the state in which they lived. Likewise, the lack of clear and consistent standards in Illinois impermissibly leaves the rights of persons deemed eligible under the bare bones requirements of the death penalty statute subject to the vagueness of statutory interpretation and practices of each county.

The primary flaw regarding the lack of standards in the Florida recount resulted from the creation of two classes of voters, with one class of voters being counted as less significant than the other based on the county the voter was in and the standards his or her county applied. 121 S. Ct. at 531 (noting the disparity created by Broward County's use of a more forgiving standard than Palm Beach County). Similarly, in Illinois, § 9-1(d) of the death penalty statute treats defendants eligible for the death penalty differently on the arbitrary basis of where the defendant committed his or her crime. Each prosecutor in each county has the authority to apply his or her own personal standard, or no standard at all. As Illinois Supreme Court Justice Ryan noted in a dissent:

> There can be no doubt that under this statute some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications will be spared, not as the result of mercy, but because of the uneven application of the law due to the lack of statutory direction to the prosecutor. There will inevitably be cases where there will be no reasonable basis for this distinction between one on

> whom the penalty of death is imposed and another who is passed over. There will be no reasonable explanation for the distinction between the two convicted offenders except that, because of the personal belief or office policy of one State's Attorney, one offender was chosen as a candidate for the penalty of death, whereas for similar reasons personal to another prosecutor, an equally culpable offender was spared.

Cousins, 77 Ill. 2d at 558, 397 N.E.2d at 822 (J. Ryan, dissenting) (citations omitted).

Reliance on county prosecutors to determine whether to seek the death penalty invariably introduces arbitrariness because the 102 counties in Illinois are markedly different in demographics and in the political beliefs of its citizenship. *See* Leigh B. Bienen, *ABA's Proposed Moratorium: The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 Law & Contemp. Probs. 193, 197-98 (1998). Some prosecutors charge every death eligible offense, others select only a subset. *Id.* Some counties have the funds to prosecute many expensive capital cases, others do not. *Id.* All of these differences are relevant in a particular county prosecutor's determination of policy in seeking the death penalty. *Id.* As a result, whether a defendant is sentenced to death is frequently a matter of mere chance depending on the characteristics of the legal jurisdiction where the crime was committed. *Id.*

Finally, neither the discretion granted to Florida counties to determine what constituted the "intent of the voter," nor county prosecutors' decisions as to which defendants will be death eligible are subject to judicial review. In *Bush*, this Court pointed to this additional flaw of the Florida process with concern. 121 S. Ct. at 532 (stating that sufficient safeguards would necessarily include "adequate statewide standards" as well as "orderly judicial review of any disputed matters that might arise"). Likewise, the lack of judicial review of prosecutors' discretionary decisions to seek the

death penalty in some cases, but not in others, is similarly constitutionally deficient.

Petitioner first challenged the constitutionality of the Illinois Death Penalty in the trial court by way of motion. The Illinois Supreme Court noted that in the post-conviction proceeding, the trial court held that the challenge to the Illinois Death Penalty Statute was waived but petitioner argued ineffective assistance of appellate counsel for failure to raise the issue on direct appeal. *Illinois v. Smith*, 195 Ill.2d at 1211, 397 N.E.2d at 677 (Appendix at D). The court summarily concluded that counsel was not ineffective for raising this claim because its earlier decisions had rejected challenges to the statute. *Id.* Nonetheless, the foregoing analysis demonstrates the patent unconstitutionality of the statute and counsel's failure to pursue the issue was deficient and caused petitioner prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court should grant review of this issue to determine the constitutionality of the statute and counsel's action in not pursuing the issue.

II. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI TO ESTABLISH CLEAR STANDARDS FOR THE PROCESS DUE UNDER POST-CONVICTION PROCEEDINGS IN WHICH CONSTITUTIONAL CLAIMS HAVE BEEN RAISED

The Illinois Post-Conviction Hearing Act ("Act") provides an opportunity for review of guilt-innocence claims as well as sentencing claims. As the Illinois Supreme Court stated, "The [Illinois] Post-Conviction Hearing Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trial or sentencing hearing." *Illinois v. Smith*, 195 Ill. 2d at 186, 397 N.E.2d at 1199 (Appendix at D). In order to invoke the Act, a petition for post-conviction relief must be filed in the circuit court in which the

original proceeding took place. *See* 725 Ill. Comp. Stat. Ann. 5/122-1 (Appendix at G).

The petitioner complied with the requirements of the Act and filed a *pro se* post-conviction petition on December 21, 1995, which was amended on December 6, 1997. *Illinois v. Smith*, 195 Ill. 2d at 186, 397 N.E.2d at 1199 (Appendix at D). However, the trial court erroneously concluded that the guilt-innocence claims raised in petitioner's post-conviction petition were either waived or barred by the doctrine of *res judicata*. The trial court therefore did not even consider whether petitioner established grounds for an evidentiary hearing before dismissing the post-conviction petition. On appeal to the Illinois Supreme Court, the petitioner argued and the State conceded at oral arguments, that petitioner's post-conviction claims were timely presented to the trial court. *Illinois v. Smith*, 195 Ill. 2d at 187, 397 N.E.2d at 1200 (Appendix at D). Rather than remand the case for initial consideration by the trial court, the Illinois Supreme Court, relying on its opinion in *Illinois v. Coleman*, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998), proceeded to apply what it termed "*de novo*" review of the petition. *Illinois v. Smith*, 195 Ill. 2d at 187, 397 N.E.2d at 1199 (Appendix at D).

The Illinois Supreme Court's approach in addressing the petition was flawed by applying what it deemed *de novo* review without remanding to the trial court for consideration of whether a hearing was required. In doing so, the Illinois Supreme Court deprived petitioner of part of the process he was due—specifically, the trial court's full consideration of the post-conviction petition and the parties' arguments in the first instance. *See, e.g., Illinois v. Kitchen*, 189 Ill. 2d 424, 434-35, 727 N.E.2d 189, 194 (2000) (holding the "circuit court violated the defendant's right to procedural due process" by denying the defendant's post-conviction petition "without notice to the parties and without the benefit of argument from either defendant or the State.")

The Illinois Supreme Court erred in applying "*de novo*" review because as its opinion in *Coleman* makes clear, the *de novo* standard of review is applicable only when the trial court has dismissed the post-conviction petition *after* considering all well-pled facts as true in favor of the petitioner and *after* determining that an evidentiary hearing is unnecessary. *See Coleman*, 183 Ill. 2d at 378, 701 N.E.2d at 1070 ("In ordering the dismissal, the [trial] court specifically ruled that 'there's nothing remarkable about the Defendant's argument in support of the petition for post-conviction relief. This Court finds the allegations do not rise to a significant deprivation of rights under the constitutions of the United States and the State of Illinois.'"). The trial court in this case however has not yet considered petitioner's post-conviction petition as is required by the Act.

By enacting the Act, Illinois has chosen to provide a comprehensive framework for review of post-conviction claims, which must begin with the trial court in which the original proceeding took place. *See* 725 Ill. Comp. Stat. App. 5/122-1. As the Illinois Supreme Court even noted in *Coleman*—the very case it relied upon to circumvent the procedural due process safeguards mandated by the Illinois General Assembly—"[it] has construed the Act to require 'that when a petition is filed invoking the act, the trial court *shall* examine the petition with a view to determining whether the allegations of fact, liberally construed in favor of the petitioner, and taken as true, make a showing of imprisonment in violation of the Federal or State constitution . . . ." 183 Ill. 2d at 380, 701 N.E.2d at 1071 (emphasis added).

Petitioner is entitled to the benefit of every step of the delineated process. The Illinois courts cannot allow any step in the process established by the legislature to be skipped. *See cf. Service v. Dulles*, 354 U.S. 363, 388 (1957) (requiring petitioner be given full process available before federal

employment decision final'"). That is because, as this Court stated in *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (Title VII), "experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." In failing to remand the matter for further proceedings consistent with the Act, the Illinois Supreme Court deprived petitioner of the process he was due. *See, e.g., Kitchen*, 189 Ill. 2d at 434-35, 727 N.E.2d at 194.

In *Kitchen*, the trial court denied the petitioner's post-conviction petition without notice to the parties and "without the benefit of argument from either defendant or the State." *Id.* at 435, 727 N.E.2d at 194. On appeal, which was decided after the *Coleman* opinion was rendered, the Illinois Supreme Court held, "We, therefore, vacate the circuit court's order denying post-conviction relief and remand the cause for further proceedings consistent with this opinion and the Act." *Id.*

The court in *Kitchen* further stated:

> This court, long ago, acknowledged that the Act should not be so strictly construed that a fair hearing be denied and the purpose of the Act, *i.e.*, the vindication of constitutional rights, be defeated. . . . In vacating the circuit court's judgment, we today, as in *Bounds*, mean to send a clear message to both bench and bar that the protection of a defendant's right to procedural due process in post-conviction proceedings is of critical importance. We trust that such a violation will not soon be repeated in our courtrooms.

Id. at 194-95, 727 N.E.2d at 895-96 (emphasis in original).

Accordingly, the Illinois Supreme Court's failure to remand the petition was fundamentally unfair and a violation of due process because the post-conviction trial judge never fully considered the petitioner's post-conviction petition before denying it. Nor did the trial judge ever determine that

an evidentiary hearing was unnecessary. Had the post-conviction trial court—which presided over the trial, imposed the sentence and, as a trial court, was more attuned to evidentiary nuance—believed it had jurisdiction to make such a determination, it may well have ordered an evidentiary hearing on some or all of the claims of the petition. If the post-conviction trial court had ruled in favor of petitioner, the Illinois Supreme Court likely would have deferred to its findings and determinations. Since that step has been skipped, the petitioner lost an opportunity in this case, unlike all other cases, for the trial court to make the initial determination. This Court should grant review to clarify the standard of the process due a defendant seeking post-conviction relief under a statutory scheme providing for two-level review of claims.

III. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE SUPREME COURT OF ILLINOIS ERRONEOUSLY APPLIED THE *STRICKLAND* STANDARD IN CONCLUDING PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE

Petitioner presented strong evidence in his post-conviction petition that trial counsel rendered ineffective assistance of counsel by failing to suppress key evidence at the guilt-innocence phase. Specifically, two statements of petitioner—arguably the most damaging evidence that can be offered in a criminal case—were admitted erroneously. Had counsel pursued and properly used available evidence, these statements would not have been admitted and the result at trial would have been different.

A. Statement at Police Station

One of the key pieces of evidence was a signed confession given at the police station on the night of the crime.

Petitioner alleged that his confession was coerced and provided support for this claim in his post-conviction petition with affidavits of several witnesses. As set forth in detail above, the testimony of Rose Palomino—which included corroboration of claims of physical abuse—was powerful evidence to support coercion. Rose Palomino's testimony should have been raised on direct appeal and counsel's failure to do so rendered assistance of counsel ineffective.

More importantly, there was significant evidence that petitioner could not have made a voluntary statement and knowingly and intelligently waived his Miranda rights because of his extensive drug and alcohol use earlier that same day. The post-conviction petition included affidavits of three witnesses that would have testified that they were with petitioner the day of the crime and that petitioner was under the influence of excessive amounts of alcohol, marijuana, and PCP at the time of the statement at the police station.

Moreover, trial counsel failed to engage and call a medical expert to testify about the effects of PCP use and petitioner's long-term drug use on the question of whether petitioner's confession was coerced and whether the waiver of *Miranda* rights was knowing. PCP is extremely hallucinogenic and can cause a psychiatric emergency. This intoxication can render a waiver of *Miranda* rights ineffective. It is impossible that anyone with petitioner's state of mind could have knowingly waived his Fifth Amendment rights.

B. Statement at Petitioner's Home

A second key piece of evidence that trial counsel failed to suppress at the guilt-innocence phase was an alleged statement of "I did it" made by the petitioner that was overheard by the police outside of petitioner's home. Even though defense counsel filed a motion to suppress the alleged statement, counsel failed to call Josephine Palomino, a key witness who was present at the time the alleged statement was

made. Her affidavit completely refutes that this statement was ever made or that petitioner otherwise admitted to any offense.

The introduction and use of both of these statements was unquestionably damaging to petitioner. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.'" *Citing Bruton v. United States*, 391 U.S. 123,139-140 (1968) (White J., dissenting)). The other evidence presented at trial was primarily circumstantial, as the physical evidence was not scientifically corroborated. Thus, counsel's failure to respond to the state's use of these statements appropriately rendered counsel's performance ineffective. Accordingly, the Illinois Supreme Court erred in refusing to acknowledge a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1984). This court should grant review to clarify this standard in the context of counsel's performance in addressing such evidence.

IV. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE SUPREME COURT OF ILLINOIS ERRONEOUSLY APPLIED THE *STRICKLAND* STANDARD IN CONCLUDING THAT THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT THE RESENTENCING PHASE

At petitioner's resentencing hearing, counsel failed to call or adequately investigate the availability or need for key expert and percipient witnesses. Had the mitigation evidence that was presented in petitioner's post-conviction petition been presented at the resentencing hearing, it would have established that petitioner was acting under an extreme

emotional and mental disturbance, that petitioner's abusive background and family history was extremely mitigating, and that petitioner generally conducted himself in a lawful, non-aggressive manner while in prison.

A. Failure to Demonstrate Petitioner's Extreme Emotional and Mental Disturbance Through Competent Evidence Regarding Drug Abuse

As set forth above, the affidavits presented in support of the post-conviction petition established that petitioner had a substantial—indeed, extraordinary—history of drug and alcohol abuse. While counsel had some appreciation of this, unfortunately he did not take the minimally required steps to develop and present the evidence in a way that would allow it to serve as meaningful mitigation. At the resentencing, counsel failed to present the complete picture and extent of abuse that is set forth in the post-conviction affidavits. More importantly, counsel failed to present appropriate expert testimony to explain the physical and psychological effects of this abuse as mitigation.

The sentencing court considered evidence from Dr. Savarese, a licensed clinical social worker, and Dr. Heinrich, a clinical psychologist. While this evidence provided some insight into the effects of drug abuse from the perspective of a social worker and psychologist, the sentencer was not provided with the technical, medical and scientific analysis that could have been provided only through a qualified medical doctor. Such an expert was available in Dr. Bruce Perry. Unlike Savarese, the social worker, or Heinrich, the psychologist, Dr. Perry has the medical and scientific training and experience that allows him to speak authoritatively on the long and short term effects of hallucinogenic drugs and other narcotics. Significantly, the state attacked the credentials of Savarese to opine on the effects of drug abuse and defense counsel did not effectively rebut this by calling an expert such as Dr. Perry.

The analysis set forth in Dr. Perry's affidavit is much farther reaching than anything to which the non-medical experts could testify. His testimony included: discussion of the correlation between PCP and agitated and violent behavior; the severity of behavioral disturbances brought about by PCP use—including the user becoming irrational, assaultive, and homicidal; the occasion of "psychiatric emergency" as a result of PCP use; and hallucinatory and fantasy thoughts. (C. 284-326).

The clear ineffectiveness of counsel's efforts on this issue is even clearer when considering that the testimony of the psychologist Heinrich suggested that petitioner demonstrated indications of neurological problems requiring further testing and analysis. Such testing and analysis could only have been provided by a competent medical expert such as Dr. Perry.

The murder here was particularly brutal. Yet, petitioner lacked any history of violent crime or sexual crime. It was readily apparent that something did not add up and it was incumbent upon counsel to investigate further and seek the assistance of a competent expert. Illinois law recognizes that scientific and medical testimony may be offered to explain the effects of drug abuse, including the use of PCP, is proper. *See Illinois v. Wright*, 111 Ill.2d 18, 488 N.E.2d 973 (1986) (doctor specializing in effects of drug addiction found persuasive in post-conviction proceeding); *Illinois v. Free*, 94 Ill.2d 378, 447 N.E.2d 218 (1983) ("that expert testimony concerning the drug PCP was necessary cannot be contested").

Moreover, defense counsel did not present evidence from the occurrence witnesses who would have testified about petitioner's PCP use. The evidence concerning the historical and contemporaneous drug use is detailed and strong. Some—but not all—of these witnesses were available and interviewed by counsel prior to sentencing. However, failure to call them cannot be attributable to trial strategy where the

evidence they could have provided was such a critical part of demonstrating petitioner's extreme emotional and mental disturbance. *Illinois v. Perez*, 148 Ill.2d 168, 592 N.E.2d. 984 (1992) (recognizing that failure to investigate cannot be a trial strategy and failure to present mitigation in counsel's possession constitutes ineffectiveness).

B. Failure to Present a Complete Picture of Family History and Background

As set forth above, the affidavits presented in support of the post-conviction petition established that petitioner had a particularly tumultuous and abusive upbringing. Under Illinois law, "evidence of a defendant's background, includeing family history, parental abuse, and neglect is important to the sentencing decision and can be an influential mitigating factor." *Illinois v. Morgan*, 187 Ill. 2d 500, 719 N.E.2d 681 (1999). Counsel bore the responsibility of portraying petitioner's background as fully as possible.

While some evidence of petitioner's tumultuous and abusive background was offered at sentencing, the complete picture was not presented. The degree of physical and emotional abuse, the encouragement of serious drug use by his mother, the full length and extent of his drug use, and the unusual sexual history were not fully portrayed until the post-conviction petition. (C. 199-233)

This court has recognized that the Sixth Amendment guarantees a defendant the right to have all mitigating evidence presented on his behalf. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). Whether through a failure to discover the evidence or a failure to offer the evidence, counsel is ineffective where all available mitigation is not offered. It is inconceivable that evidence of this nature could not be pursued or presented based upon a "tactical decision."

Trial counsel's failure to present the available substantial mitigating evidence at petitioner's resentencing hearing

demonstrates his ineffectiveness. Therefore, the Illinois Supreme Court erroneously applied the *Strickland* standard in concluding petitioner received effective assistance of counsel at the resentencing phase.

C. Failure to Rebut Aggravating Evidence of Petitioner's Conduct While in Prison

At the re-sentencing, the state attempted to portray petitioner as aggressive and incapable of conforming himself to the rules and requirements of incarceration. While this hardly seems the kind of evidence that would be determinative in a capital sentencing, it was offered and considered and thus should have been rebutted. As set forth above, ample evidence existed to rebut the state's aggravation. Correctional officers who were familiar with petitioner and his conduct while residing in the condemned unit would have testified to petitioner's generally peaceable and law-abiding conduct and nature there. (C. 329-31)

Counsel's failure to address this comparatively simple issue and put forth basic contrary testimony demonstrates an overall lack of competence and effectiveness. There is no question that petitioner was entitled to a complete mitigation picture and counsel did not provide that.

This Court should grant review to clarify the limitations of counsel's responsibility to present mitigating evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

STEVEN F. MOLO
Counsel of Record
ILENE L. BLOOM
WINSTON & STRAWN
35 West Wacker
Chicago, IL 60601-9703
(312) 558-5600

Counsel for Petitioner

MARSHALL J. HARTMAN
Capital Litigation
DIVISION OF ILLINOIS STATE
APPELLATE DEFENDERS
OFFICE
600 W. Jackson Blvd.,
Sixth Floor
Chicago, IL 60661

APPENDIX A

SUPREME COURT OF ILLINOIS

No. 68474

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

DAVID SMITH,
Appellant.

October 15, 1992

OPINION

JUSTICE CLARK delivered the opinion of the court:

David Smith (defendant) was charged in connection with the March 17, 1987, stabbing death of Lisa Ferguson (victim) in Chicago. After the prosecutor nol-prossed other counts of the indictment, defendant proceeded to a jury trial in the Cook County circuit court on the following charges: two counts of murder (Ill. Rev. Stat. 1987, ch. 38, pars. 9-1(a)(1), (a)(2)); two counts of felony murder (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(a)(3) (with aggravated criminal sexual assault and home invasion as predicate felonies)); one count of home invasion (Ill. Rev. Stat. 1987, ch. 38, par. 12-11(a)(2)); and

two counts of aggravated criminal sexual assault (Ill. Rev. Stat. 1987, ch. 38, par. 12-14(a)(2)). Defendant was convicted of murder, aggravated criminal sexual assault and home invasion. At a separate sentencing hearing, the same jury found defendant eligible for the death penalty and sentenced him to death. (Ill. Rev. Stat. 1987, ch. 38, par. 9-1(g).) Defendant's death sentence was stayed pending direct appeal to this court (Ill. Const. 1970, art. VI, § 4(b); 134 Ill. 2d Rules 603, 609(a)).

BACKGROUND

The evidence showed that sometime in early March of 1987, the victim quarreled with her boyfriend, Anthony Ramirez. Shortly thereafter she moved in with her aunt, Juanita Soto, in Juanita's rear apartment. Also living at the apartment were Juanita's boyfriend, Carlos Moya, their four-year-old child, Sirena Moya, and a friend named Edward Ramirez who needed a temporary place to stay. On the night of the murder, Lisa agreed to babysit for Sirena while the others celebrated at a local bar three to four blocks from the apartment.

Juanita met Carlos at the bar late in the afternoon, and defendant arrived with his friends Edward and Efraim Ramirez around 6 p.m. Juanita and Carlos chatted with defendant for awhile. Juanita had known defendant for 13 or 14 years and considered him to be a good friend; defendant visited Carlos and Juanita often to eat meals or to spend the night. Carlos in turn had known defendant for 12 years. The victim's brother, Max Ferguson, was also at the bar, and Max grew up in defendant's neighborhood.

Defendant left the bar alone around 7:30 p.m.

Max and Edward Ramirez left around 8:15 p.m. to visit the victim, but they soon came running back into the bar "huffing and puffing." Juanita, Edward, and Carlos ran to the apartment, where they were met by Chicago police officers.

At 7:45 p.m. that night Sharon Chandler, who lived in the front apartment, heard someone in the rear apartment yelling and screaming. Sharon heard a woman ask, "What do you want, leave me alone," and a man say, "Shut up, be quiet." Sharon also heard a noise similar to that of furniture being moved and some "slapping sounds, someone hitting someone else." Sharon knocked on Lisa's door and asked the occupants of the apartment to be quiet. While calling the police department to report a fight, Sharon heard the woman yell, "Help me! Help me!" Then there was a long scream followed by complete silence. Police officers arrived 5 to 10 minutes later.

Officer Sharon Gaynor responded to a radio call of a fight in progress in the rear apartment at 8:15 p.m. Upon arriving at the scene, Gaynor found the back door of the rear apartment open. Entering the apartment, she found the victim's body lying face down in a pool of blood. The victim was naked from the waist down, and her jeans and panties had been pulled down and caught near her right ankle. Her shirt had been pulled up above her waist. Officers found two knives with bent blades under and next to the body as well as a curling iron under the victim's left leg and near her buttocks.

As Officer Gaynor inspected the victim's body, she heard a noise in another room and discovered four-year-old Sirena Moya "huddled in the corner of the bedroom with a blanket pulled over her head." During a conversation between them, Sirena said a man named "David," her father's friend, had been in the apartment that evening. Gaynor found an address book in the apartment that contained the name "David Smith" and called the number, only to find that it had been disconnected.

Juanita Soto gave police officers a description of the clothing worn by defendant in the bar that evening and directed Officers Simon and Lukensmeyer to defendant's nearby apartment. Juanita and Max Ferguson also directed officers to Anthony Ramirez's home where Ramirez, the victim's boyfriend, was taken into custody.

As Simon and Lukensmeyer stood in the gangway outside defendant's apartment building at approximately 10 p.m., they could hear a man and woman arguing. Standing in the hallway the officers heard defendant say, "I saw somebody get killed tonight," followed by the statement, "I did it." After the officers knocked on the door and defendant identified himself, defendant was taken into custody. Testimony indicated that defendant had changed his clothes after leaving the bar, and also that his hair was wet when arrested.

After Josephine Palomino told officers that they could "look around" the apartment she shared with defendant, Officer Lukensmeyer found a pair of jeans and some thermal underwear in a laundry wash basin in the apartment. The clothing was wet. Palomino later signed a written consent to search which the officers relied on in returning to defendant's apartment to recover a pair of shoes. The jeans, thermal shirt and shoes were identified as clothing worn by defendant in the bar that evening, and there was human blood on the thermal underwear and shoes. No blood was found on defendant's jeans.

No latent fingerprints were found on the knives discovered near the victim's body. Latent prints found at various locations inside the apartment belonged to the victim or could not be identified. Vaginal, oral and rectal swabs taken from the victim tested negative for the presence of semen and spermatozoa. The victim and defendant shared the same blood type.

After receiving Miranda warnings, and having been told there was blood found on his clothing, defendant gave oral statements at approximately 10:30 p.m. In a written summary of these statements taken at 1:20 a.m. by Edward Edens, an assistant State's Attorney, defendant admitted killing Lisa Ferguson. According to this summary which defendant signed, defendant had known Lisa Ferguson for several years but he did not know that she was still in the neighborhood. He admitted going to the apartment that evening to steal a VCR. When Lisa answered the door, he asked if "Boo Boo" Ramirez was home, received a negative answer, and left. Defendant then walked around for a while and then returned. The summary taken by Edens states that "he didn't know why he went back up to the apartment except that he must have intended to kill her." Defendant then forced his way into the apartment and stabbed Lisa with a knife he found in the kitchen. The statement indicates that cuts found on defendant's body were not received during the murder but were from an injury defendant had received at work the day before. The statement indicates that "he was glad that she died because he wouldn't want her to remember how badly he had beaten her."

At one point while being interrogated, officers asked defendant to remove his pants. A large stain on defendant's knee contained human blood. Officers testified that they denied defendant's request to use the restroom after noticing the blood because they feared he would attempt to destroy evidence. Forensic experts later found human blood on the inside panel of defendant's underpants. The officers also noticed a fresh cut covered by a bandage on defendant's thumb and photographed abrasions on defendant's wrists.

Anthony Ramirez was also interrogated by police. Officer McCann testified that he inspected Ramirez for bloodstains and asked him to drop his pants to see if there was blood on his body. No blood was found. Later, Ramirez and

defendant were placed in a lineup with two fillers and Sirena Moya identified defendant. (*This identification was not used* by the State at defendant's trial, however.) Ramirez was later released without being charged.

Following trial, the jury found defendant guilty of murder, home invasion, and aggravated criminal sexual assault. The jury also found defendant eligible for the death penalty under the statutory aggravating factor of murder in the course of the felony of home invasion or aggravated criminal sexual assault. (Ill. Rev. Stat. 1989, ch. 38, par. 9-1(b)(6).) After the same jury concluded that there were no mitigating factors sufficient to preclude the death penalty, and defendant declined to give a statement in allocution, the judge sentenced defendant to death for the murder of Lisa Ferguson and ordered penitentiary terms for the remaining felonies.

We address the issues raised by defendant seriatim.

I

Defendant argues that the officers violated the fourth amendment and article I, section 6, of the Illinois Constitution when they listened to a conversation from outside his apartment door. Because police conduct violated these constitutional rights, he argues, his statements admitting involvement in a murder that evening should have been suppressed.

Testimony at both trial and at defendant's suppression hearing detailed the circumstances immediately prior to defendant's arrest. After police officers talked to Sirena Moya and the victim's relatives, Officers Simon and Lukensmeyer drove to defendant's home. Walking through a gangway next to defendant's apartment building, the officers heard a man

and woman arguing in the basement apartment. The officers went to the back of the building, opened the unlocked back door, walked down a few steps into the building and entered a common-area hallway. The door of defendant's basement apartment was five to six feet from the back door. While standing in the hallway, Officer Simon testified, he heard the following conversation between a woman and man. The man's voice was later identified as belonging to defendant:

Female voice: "Where have you been tonight?"

Defendant: "I have been out."

Female voice: "Where have you been tonight?"

Defendant: "I saw somebody get killed tonight."

Female voice: "Your clothes are all full of blood. You had something to do with it."

Defendant: "I did it."

The officers then knocked on the door, announced that they were police and asked the man inside to open the door. Defendant opened the door, identified himself, and the officers arrested him. Defendant challenges the trial court's decision to allow one of the officers to testify regarding that portion of the conversation spoken by defendant under the admission exception to the hearsay rule. The trial court suppressed those statements made by the female voice.

The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." (U.S. CONST., amend. IV.) The Illinois Constitution similarly protects the right of the people "to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." (ILL. CONST. 1970, art. I, §6.) We believe that neither protection was violated in this case.

The starting point for fourth amendment search and seizure analysis is Katz v. United States (1967), 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507. In Katz, the United States Supreme Court established the principle that the "Fourth Amendment protects people, not places." Justice Harlan's concurring opinion in Katz noted that the place where the search occurs is still important, but established a two-prong requirement for determining when the fourth amendment is triggered. This test has since been adopted by the majority of the Court. (California v. Ciraolo (1986), 476 U.S. 207, 211, 90 L. Ed. 2d 210, 215, 106 S. Ct. 1809, 1811.) First, a person must have exhibited an actual (subjective) expectation of privacy in the place searched or thing seized. Second, this expectation must be one that society is willing to recognize as "reasonable." Katz, 389 U.S. at 361, 19 L. Ed. 2d at 588, 88 S. Ct. at 516 (Harlan, J., concurring).

In People v. Wright (1968), 41 Ill. 2d 170, 242 N.E.2d 180, this court considered the case in which a police officer watched and listened through a rear window of an apartment from a CTA right-of-way only one to three feet from the building. There it was noted that the Katz decision eliminated the former fourth amendment "requirement" that there be a "trespass" before fourth amendment rights were implicated. Wright went on to hold, however, that "while the absence of a trespass is no longer to be an adequate ground to

justify the admission of evidence secured through use of the natural senses assisted by artificial means, the lack of a trespass is still a highly relevant consideration in sustaining the admission of evidence which has fallen into the plain view of an officer, i.e., gathered solely by the use of his natural senses." (Emphasis added.) (Wright, 41 Ill. 2d at 175.) The Wright decision upheld the introduction of the evidence developed from the officer's investigation, even though such evidence resulted from his eavesdropping into a private residence through an open window.

We believe that under the facts surrounding the conversation overheard by the officers, no fourth amendment "search" can be said to have occurred because defendant did not have a reasonable expectation of privacy in his conversation. Several facts support this conclusion. First, the area where the officers overheard defendant's conversation was a common area shared by other tenants, the landlord, their social guests and other invitees. (See, e.g., Commonwealth v. Hall (1975), 366 Mass. 790, 794, 323 N.E.2d 319, 322 (expectation of privacy diminished in common areas of apartment building); *Lorenzana v. Superior Court* (1973), 9 Cal. 3d 626, 629, 511 P.2d 33, 35, 108 Cal. Rptr. 585, 587 ("sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy").) Second, the area where the officers were standing when they overheard the conversation was unlocked. (See Hall, 366 Mass. at 794, 323 N.E.2d at 322 (police conduct in deliberately circumventing building security indicated violation of reasonable expectation of privacy).) Third, defendant's voice was raised. (United States v. Burns (10th Cir. 1980), 624 F.2d 95 (no privacy interest in conversation loud enough to be overheard outside room); accord *United States v. Llanes* (2d Cir. 1968), 398 F.2d 880, 883-84.) Fourth, the officers used no artificial means to enhance their ability to hear defendant's conversation, nor did

they enter an area where they had no legal right to be. (People v. Wright (1968), 41 Ill. 2d 170, 242 N.E.2d 180.) While none of these factors is necessarily sufficient alone to justify our conclusion, when taken together, it becomes clear that no fourth amendment search is implicated here.

Nor do we believe that the officers conduct in this case violated the constitutional protections found in article I, section 6, of our State constitution. While it is true that the Illinois Constitution was redrafted in 1970 to include specific protection against "interceptions of communications by eavesdropping devices or other means," the factors which support our fourth amendment analysis also support a finding that the officers' conduct here was not "unreasonable" as that word is used in this section. Therefore, while defendant's State constitutional protections against government "interceptions of communications" were triggered by the police conduct of listening to his conversation, we find no violation of the State constitution.

II

Defendant next claims that the officers improperly arrested him in his apartment without a warrant. (*See generally Payton v. New York* (1980), 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (officers may not engage in nonconsensual and warrantless entry into home to make routine felony arrest).) At both the suppression hearing and at trial, Officer Simon said that officers drove to defendant's apartment approximately two hours after the murder. The record is unclear whether the officers went to the apartment to arrest defendant or whether they were simply carrying out the investigation as to the facts surrounding the murder. In any

event, Simon and another officer entered the unlocked back door of the building after hearing a loud argument from outside. They entered the vestibule or hallway leading to several of the apartments in the building and listened at defendant's door for a minute or two. An officer accompanying Simon looked through a hole in the door. After hearing a woman question a man in the apartment about the presence of blood on his clothing, and hearing the man admit his involvement in a murder, the officers knocked on the apartment door. Defendant answered the door and identified himself. The officers then pulled him out into the hallway and arrested him.

Defendant points to Officer Simon's statements in the record which indicate that "during [the arrest] process I might have taken one step into the apartment." Defendant claims that this intrusion into his home violated the fourth amendment and article I, section 6, of the Illinois Constitution. Defendant points to the Payton decision, which states, "[T]he Fourth Amendment has drawn a firm line at the entrance to [a] house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590, 63 L. Ed. 2d at 653, 100 S. Ct. at 1382.

The State relies on *United States v. Santana* (1976), 427 U.S. 38, 42, 49 L. Ed. 2d 300, 305, 96 S. Ct. 2406, 2409, a pre-Payton case, for the proposition that the open doorway of a defendant's home is a "public place" for purposes of fourth amendment analysis. The State argues that once police properly encounter a suspect there they may minimally intrude into the home in order to complete an arrest. Assuming that Officer Simon "entered" defendant's home by taking a step into the doorway or reaching in to arrest him the night of the murder, the State argues that so long as he acted in "a fluid and uninterrupted series of events," we should find that defendant's constitutional rights were not violated. A

number of Illinois appellate decisions would seem to support this view. *People v. Wolff* (1989), 182 Ill. App. 3d 583, 131 Ill. Dec. 235, 538 N.E.2d 610; People v. Hall (1987), 164 Ill. App. 3d 770, 115 Ill. Dec. 750, 518 N.E.2d 275; *People v. Lekas* (1987), 155 Ill. App. 3d 391, 108 Ill. Dec. 60, 508 N.E.2d 221; *People v. Graves* (1985), 135 Ill. App. 3d 727, 90 Ill. Dec. 516, 482 N.E.2d 223; *People v. Patton* (1984), 122 Ill. App. 3d 46, 77 Ill. Dec. 547, 460 N.E.2d 851; *People v. Morgan* (1983), 113 Ill. App. 3d 543, 69 Ill. Dec. 590, 447 N.E.2d 1025; *People v. Schreiber* (1982), 104 Ill. App. 3d 618, 60 Ill. Dec. 417, 432 N.E.2d 1316. *See also* 2 W. LaFave, Search & Seizure §6.1(e), at 590-91 (2d ed. 1987) ("[I]f the arrestee does not retreat from the door but the police officer merely reaches in to manifest the fact of arrest, such a *de minimus* breaking of the vertical plane above the threshold should not itself make the warrantless arrest unlawful").

We leave for another day the question of whether these cases can be fairly squared with Payton, for we find the officer's conduct in this case to have been reasonable due to the "exigent circumstances" which existed at the time of defendant's arrest. Several factors have been identified as being relevant to the question of whether a given factual situation creates an exigent circumstance which justifies the warrantless entry into a home by police, including when: (1) there is involved a grave offense, particularly a crime of violence; (2) the suspect is reasonably believed to be armed; (3) there exists a clear showing of probable cause; (4) there is strong reason to believe that the suspect is in the premises; (5) there is a likelihood the suspect will escape if not swiftly apprehended; and (6) the police entry, though nonconsensual, is made peaceably. (*People v. Yates* (1983), 98 Ill. 2d 502, 515, 75 Ill. Dec. 188, 456 N.E.2d 1369.) The balance of these factors clearly supports the police conduct here. First, we note the seriousness of the violent crime the officers were investigating and the importance of capturing the victim's murderer quickly. Second, although nothing in the record

supports the conclusion that the police believed the suspect to be armed, there is a clear showing of probable cause at the time of defendant's arrest, particularly in light of the suspect's overheard admission of committing a murder that evening. Third, the fact that officers overheard a man in the apartment which had been identified by witnesses as belonging to defendant, when added to the fact that this man admitted involvement in a murder, gave strong assurances to the police that defendant was on the premises before they entered his home. Fourth, while there is nothing to indicate that the suspect was about to take flight from the police at the time they arrested him, we note the peaceable way in which the police effectuated his arrest.

In addition to the factors discussed above, we note two additional considerations important to our decision. The officers here faced the situation in which they were nearly certain that evidence of a murder in the form of bloodstained clothing was just beyond the door and that this evidence would likely disappear absent prompt action. In addition, we believe it important that the police in this case did not delay in moving from the scene of the murder to defendant's home. As the time between when the police formulate probable cause and when defendant is arrested grows longer, the "exigency" of the situation is certainly diminished. Here the record is unclear as to when the police established probable cause to arrest defendant, i.e., whether the police went to defendant's home to arrest him or merely to interview him. Under either circumstance, however, the period of time between when the police could lawfully arrest defendant and when they in fact did so was brief, a factor which clearly supports the reasonableness of their action. *See generally Dorman v. United States* (D.C. Cir. 1970), 140 U.S. App. D.C. 313, 435 F.2d 385; 2 W. Lafave, Search & Seizure § 6.1(f), at 595-608 (2d ed. 1987).

This court has determined that the protections afforded by article I, section 6, of our State constitution against "unreasonable" searches and seizures are substantially identical to those provided by the fourth amendment. (People v. Tisler (1984), 103 Ill. 2d 226, 241-42, 82 Ill. Dec. 613, 469 N.E.2d 147.) Even if we assume arguendo that there has been an in-home seizure in this case, we have already concluded that such seizure was "reasonable" due to the exigent circumstances that surrounded it and, therefore, not a violation of the fourth amendment. For these same reasons, we conclude that there has been no violation of article I, section 6.

III

Defendant next claims that no one gave valid consent to search his apartment. Police twice searched defendant's home pursuant to separate consents given by Josephine Palomino, defendant's girlfriend. After officers arrested defendant in his doorway, and after the officers sought and received Palomino's consent to search the apartment, officers first seized the clothing that defendant had worn in the bar that evening. Those clothes, found wet in defendant's laundry washtub, contained traces of human blood. The second search was conducted after defendant had been taken to police headquarters. After they obtained Palomino's written consent to search, the officers returned with Palomino to the apartment where she pointed out defendant's bloodstained gym shoes.

Defendant does not contest Palomino's power to consent to these searches. Instead, he argues that she initially gave consent to the officers to enter the apartment only, not to

search for evidence. According to the uncontroverted testimony given at the suppression hearing and at trial, however, officers asked her for permission to "look around" and Palomino agreed. Palomino walked with the officers through the apartment and did not protest when they obtained defendant's clothing. Considering the totality of the circumstances, it was objectively reasonable for the officers to conclude that Palomino had consented to a search of the apartment. This conclusion is buttressed by the fact that Palomino later gave her written consent to search the apartment a second time. The trial judge decided that Palomino's consent was freely given, and because that conclusion is not "clearly unreasonable," that decision will not be overturned. *People v. DeMorrow* (1974), 59 Ill. 2d 352, 358-59.

Nor do we agree that Palomino's consent was flawed due to the fact that she may not have understood her right to refuse. The voluntariness of a consent is a question of fact to be determined by the totality of the circumstances. (Schneckloth v. Bustamonte (1973), 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041.) None of the appellate cases cited to us by defendant involving force or improper police conduct supports the proposition that police conduct here overcame Palomino's ability to refuse. (*See, e.g., People v. Walters* (1989), 187 Ill. App. 3d 661, 668-69 (consent invalid where police first made illegal entry into home and displayed invalid search warrant); *People v. Vought* (1988), 174 Ill. App. 3d 563, 570-73, 124 Ill. Dec. 204, 528 N.E.2d 1095 (search invalid where police secured consent from hotel manager who had no authority); *People v. Odom* (1980), 83 Ill. App. 3d 1022, 1027-28, 39 Ill. Dec. 406, 404 N.E.2d 997 (consent given after illegal gunpoint arrest held invalid).) We find defendant's arguments attacking the searches of his apartment to be meritless.

IV

Defendant next challenges the decision of the trial judge to admit his written statement, taken at the police station, into evidence. According to the testimony of State's witnesses, Detective McCann began interviewing defendant at approximately 10:45 p.m., about 15 minutes after defendant was brought to police headquarters. McCann read the Miranda warnings to defendant, and defendant said he understood his constitutional rights. This interview lasted about 10 to 15 minutes. At this time officers noticed bloodstains on defendant's clothes, and evidence technicians were called to take samples from defendant and his clothing. Officers testified that because they feared he would destroy evidence, defendant's request to use the restroom was temporarily denied. Defendant then participated in a lineup.

At approximately 12:45 a.m., Detective Koclanis began the second interview, which lasted 15 to 20 minutes. Koclanis also gave defendant Miranda warnings and defendant again indicated he understood his rights.

At 1:20 a.m., Assistant State's Attorney Edward Edens again gave defendant his Miranda warnings, and defendant acknowledged his understanding of his rights for the third time. At the end of this 15 to 30 minute interview, defendant signed the written statement now challenged. Defendant signed a rights waiver within that statement, and he read the statement "line by line" aloud in the prosecutor's presence before signing each page and initialing a minor correction.

Officers testified that defendant was alert and answered questions accurately, and that he did not appear to be under the influence of alcohol or drugs. When interviewed by the prosecutor, defendant did not report abuse from the officers.

According to the police, defendant never asked to consult an attorney or his girlfriend, Josephine Palomino.

Defendant mounts a three-way attack against the written statement. First, he claims that the trial judge used an improper legal standard in determining the appropriateness of defendant's written confession. As this court has held, an in-custody confession is given voluntarily only after a knowing and intelligent waiver of the suspect's constitutional rights has been obtained. (*People v. Martin* (1984), 102 Ill. 2d 412, 423-24, 80 Ill. Dec. 776, 466 N.E.2d 228.) When determining whether a statement is given "voluntarily," we look to the "totality of the circumstances." (*Martin*, 102 Ill. 2d at 426-27.) "The test is whether it has been made freely, voluntarily and without compulsion or inducement of any sort or whether defendant's will was overcome at the time he confessed." *People v. Prim* (1972), 53 Ill. 2d 62, 70, 289 N.E.2d 601.

Our review of the record indicates that the trial judge used the appropriate test to judge the voluntariness of defendant's confession here. After observing that defendant had signed a written waiver of the rights enumerated in *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the judge said:

"I think that Mr. Smith was given those rights on numerous occasions. I think that he understood those rights. The next question is whether he gave that statement freely and voluntarily or whether in the words of all of the cases, his will was overcome in any regard by the police or any other instrumentality, whether—was this statement freely and voluntarily given, or was there some compulsion, threat, force, bodily injury, et cetera."

There is no indication that the judge misapprehended the law or otherwise used an improper standard. This is not a situation such as that which existed in *People v. Davis* (1982), 105 Ill. App. 3d 549, 558, 61 Ill. Dec. 48, 433 N.E.2d 1376, where the appellate court concluded that the trial judge misunderstood the fifth amendment and did not know that questioning must cease if the suspect invokes his right to remain silent.

Defendant emphasizes testimony which indicates that he was subjected to physical abuse by the police. He points to testimony given at the suppression hearing in which his girlfriend, Josephine Palomino, indicated that defendant was yelling and screaming and that she could hear a "commotion" in the room where defendant was interrogated. In her words, defendant "was telling the police officers * * * to leave him alone, not to touch him, to get away from him, and he was calling for me. I want to talk to Josie. I want to talk to Josie. I want to talk to Josie." At trial Josephine's mother similarly claimed she heard defendant holler "get your fucking hands off of me." This testimony was contradicted, however, by police officers and the assistant's State's Attorney when they testified that no abuse, force, or threats of force were used during their interrogation and that defendant did not yell while being questioned.

It is well established that physical abuse by the police during interrogation will negate any confession which a defendant may make. (*See, e.g., People v. Wilson* (1987), 116 Ill. 2d 29, 106 Ill. Dec. 771, 506 N.E.2d 571 (State bears burden of proving by clear and convincing evidence no abuse when defendant injured while in custody).) However, equally well established is the rule that a trial judge's determination that a confession was given voluntarily will not be overturned absent a showing that such decision is against the manifest weight of the evidence. (*People v. Martin* (1984), 102 Ill. 2d 412, 80 Ill. Dec. 776, 466 N.E.2d 228.) When deciding

defendant's allegation of physical abuse, the trial judge was faced with the difficult problem of squaring Palomino's testimony with that of the officers and State's Attorney. Although there was some evidence that defendant yelled several times that evening, we agree with the trial court's determination that there is a distinct lack of evidence to indicate physical abuse or to support defendant's contention that his written statement was obtained improperly. Therefore, we will not overturn the trial court's decision with regard to the statement's voluntariness.

Defendant correctly notes that once an accused subject to questioning by police indicates his desire to cut off questioning, the police must promptly do so. Defendant contends that his statement to the police, "leave me alone," amounted to an invocation of this fifth amendment right and that his written statement to the State's Attorney, having been made after he cut off questioning, must be suppressed. Several court decisions from other jurisdictions give credence to this argument, and courts have generally concluded that even an equivocal invocation of the right to remain silent is sufficient to require the police to cut off questioning. (*State v. Bey* (1988), 112 N.J. 45, 65, 548 A.2d 846, 856; Christopher v. Florida (11th Cir. 1987), 824 F.2d 836, 841; *Martin v. Wainwright* (11th Cir. 1985), 770 F.2d 918, 924 n.6.) Indeed, Miranda itself stated that an accused had the right in "any manner, at any time prior to or during questioning" to invoke the right to remain silent. (Emphasis added.) (*Miranda*, 384 U.S. at 473-74, 16 L. Ed. 2d at 723, 86 S. Ct. at 1627.) Several factors lead us to conclude, however, that defendant did not invoke his fifth amendment right in this case.

Initially, we note that the first time defendant raises this argument was not to the trial judge who had the opportunity to observe the demeanor of the witnesses who testified, but in his briefs to this court. His failure to argue this theory would normally waive this issue, but under our "plain error" doctrine

we feel compelled to address defendant's arguments. (134 Ill. 2d R. 615(a).) This is because defendant's confession, if improperly admitted in violation of the fifth amendment, may have denied him a fair trial. The fact that defendant's counsel did not initially raise this theory, however, gives some indication that defendant did not assert his fifth amendment right at the time of questioning. (*See, e.g., People v. Del Vecchio* (1989), 129 Ill. 2d 265, 276, 135 Ill. Dec. 816, 544 N.E.2d 312 (counsel's failure to make timely objection indicates lack of sufficient prejudice).) Second, we note that Palomino's testimony was in opposition to testimony provided by the police that defendant did not yell or scream during questioning. Although the trial judge did not find Palomino to be an incredible witness, the fact that her testimony contradicted the testimony of the police undercuts defendant's claim. Third, even assuming that defendant yelled something such as "Get your hands off me, leave me alone," Palomino's testimony fails to sufficiently indicate that defendant was speaking to one of the officers who was then questioning him. Testimony indicated that the officers moved defendant at least once during his interrogation and also that an evidence technician removed bloodstains from defendant's skin while he was in custody. Defendant was no doubt touched on both occasions. We believe that if, for example, defendant's statements were made in response to either the police while they were moving defendant or to the technician while he was removing blood, these statements, taken alone, could not serve to invoke defendant's fifth amendment rights to cut off questioning. Finally, we note that while Palomino's mother testified at trial that defendant raised his voice at one point and yelled, "Get your fucking hands off me!" bolsters Palomino's testimony somewhat, Palomino's mother did not testify that defendant yelled, "Leave me alone!" This omission from Palomino's mother's testimony undercuts defendant's claim.

Defendant argues that at the very least the question of whether he asserted his fifth amendment privilege is ambiguous and that he should be entitled to a new suppression hearing so that the trial judge may rule on this question. However, in light of the distinct lack of evidence indicating that a fifth amendment privilege was asserted, we deny defendant's claim.

V

During argument on defendant's pretrial motion in limine, the State indicated its intention to offer four-year-old Sirena Moya's statements into evidence through the testimony of Officer Gaynor, the police officer who found Sirena on the night of the murder. The judge ruled that Sirena's statements could be admitted into evidence under the "excited utterance" or "spontaneous declaration" exception to the hearsay rule. Defendant attacks this ruling on several grounds.

When called as a State's witness for the case in chief, Officer Sharon Gaynor testified that she received a radio call of a fight in progress at 8:15 p.m. on March 17, 1987. Gaynor arrived at the victim's apartment within 10 minutes of the call and found the victim's body on the kitchen floor. Gaynor then walked from the kitchen to the bedroom to investigate noises that she heard.

Officer Gaynor found Sirena "huddled in the corner of the bedroom with a blanket pulled over her head." Gaynor told Sirena she was there to help her and "tried [her] best to calm her down." Sitting on the bed next to Sirena, Gaynor explained that she was a police officer, and Sirena provided her name in response to a question from Gaynor. Gaynor then asked Sirena if she knew where her mommy was, and

the girl answered her mommy was "out." Gaynor asked who the "lady in the other room" was, and Sirena replied that it was Lisa, her baby-sitter. In Gaynor's words, "I also asked her if there was anybody else home with her that particular evening or in the apartment with her, and she stated David. I asked her who David was, she said friend of my daddy's." Officer Gaynor replaced the blanket over Sirena's head and escorted the girl out of the apartment. In a personal telephone directory in the kitchen, Gaynor found a name and number for "David Smith," but the number had been disconnected. Acting on Sirena's statements and other information acquired from the victim's family members, police officers arrested defendant in his home at 10 o'clock that evening.

The State initially argued that Sirena's statements were being offered for the nonhearsay purpose of explaining to the jury the police action of arresting defendant. After a court recess, however, the trial court ruled this evidence admissible to prove the truth of the matter asserted under the spontaneous declaration or excited utterance exception to the hearsay rule.

To secure admission of a "spontaneous declaration" or "excited utterance," the proponent of the evidence must demonstrate: (1) the occurrence of an event or condition sufficiently startling to produce a spontaneous and unreflecting statement; (2) absence of time to fabricate; and (3) a statement relating to the circumstances of the occurrence. (*People v. Poland* (1961), 22 Ill. 2d 175, 181, 174 N.E.2d 804.) We believe that this court's decision in People v. Nevitt (1990), 135 Ill. 2d 423, 142 Ill. Dec. 854, 553 N.E.2d 368, speaks directly to the question of whether Sirena's out-of-court statements were admissible as an excited utterance.

In Nevitt, a day-care worker was accused of aggravated criminal sexual assault upon a three-year-old boy. Five hours after the incident, the boy's mother noticed that her son was

unusually withdrawn. When questioned what was wrong, the boy blurted out, "Teacher Tony bit my dingdong." This court held the statement to be admissible under the excited utterance exception despite (1) the significant passage of time between the assault and the statement, and (2) the fact that the statement was made in response to a question. This court found the statement to be "the product of the event, rather than the child's deliberation." (Nevitt, 135 Ill. 2d at 445.) Significant in the Nevitt analysis was the fact that the child's first statement to his mother once away from the day-care center related to the incident.

We believe that the same rationale which underlies the Nevitt decision applies to this case. With regard to the Poland three-part analysis, two of the three elements were clearly met here. First, Sirena was most certainly exposed to a startling event. Medical testimony at trial was clear: Lisa Ferguson was brutally beaten, stabbed and then left to die. Neighbors testified that they heard the victim screaming "Help me! Help me!" Even if Sirena did not witness the murder of her cousin and baby-sitter, however, she certainly heard her screaming for help. Defendant argues that the State has failed to lay a proper foundation to support the fact that Sirena was exposed to a "startling occurrence," but we strongly disagree with this characterization. Officer Gaynor's testimony that Sirena was "huddled in the corner of the bedroom with a blanket pulled over her head" and that Gaynor "tried [her] best to calm her down" convinces us that Sirena was sufficiently unnerved by the event to make her statements "excited." Nor do we believe that Gaynor's efforts to calm Sirena down or to get her to respond to questions reduced the tension of the event below what is necessary under the excited utterance exception.

Second, assuming for the sake of argument that Sirena had some motive to fabricate testimony to Officer Gaynor, we do not believe that Sirena had sufficient time to do so here.

Evidence indicated that Gaynor was in the apartment within 10 minutes of the time the victim was heard screaming. We do not require the time between when the startling event occurs and when the declarant makes statements in response to that event to be contemporaneous. (*See, e.g., People v. Gacho* (1988), 122 Ill. 2d 221, 119 Ill. Dec. 287, 522 N.E.2d 1146 (statement made by declarant after 6 1/2 hours locked in car trunk falls within exception).) "The proper question is whether the statement was made while the excitement of the event predominated." (M. Graham, Cleary & Graham's Handbook of Illinois Evidence §803.3, at 627 (5th ed. 1990).) Moreover, it is significant that the first person Sirena was able to speak to following the murder was Officer Gaynor. (Nevitt, 135 Ill. 2d at 445; Gacho, 122 Ill. 2d at 241.) Nor does the fact that Sirena spoke after being prompted by Officer Gaynor destroy the spontaneity of Sirena's statement. (Gacho, 122 Ill. 2d at 242 ("That the statement was made in response to a question * * * does not necessarily destroy its spontaneity").) The short period of time involved here meets the second element of the Poland analysis.

Defendant argues that the State has failed to lay the foundation for the third element of the Poland inquiry, i.e., whether the statement related to the startling event. Defendant's counsel characterizes Sirena's statement as merely indicating that David was in the apartment sometime that evening, not that David was in the apartment during the murder. Our review of the record indicates that any lack of foundation here is likely the result of the fact that the State sought to introduce this evidence initially only to explain the conduct of the police in arresting defendant, not to show that he committed the crime. Even if we were to accept defendant's characterization of Sirena's statements, however, we do not believe that the lack of foundation would be fatal to the State's use of the excited utterance exception. As Nevitt makes clear, the Poland elements are taken as a whole, not as individual preconditions necessary to establish the existence

of the hearsay exception. (*Nevitt*, 135 Ill. 2d at 444-45.) We find that Sirena's statements were properly admitted by the trial court under the excited utterance exception to the hearsay rule.

Defendant next argues that Sirena's statements should not have been admitted due to the fact that there was no determination that she was competent to testify at trial. He claims that it is, therefore, unfair to admit Sirena's statements by misdirection through use of the excited utterance hearsay exception.

We note, however, that absent a showing by defendant, Sirena was qualified to testify in spite of her young age. (Ill. Rev. Stat. 1989, ch. 38, par. 115-14.) Defendant made no such showing. Even if it is assumed that Sirena was incompetent to testify, however, we believe that the utterances made here are sufficiently reliable to have been admitted. We note that the trustworthiness of Sirena's statement stems not from her competency, but rather from the unique circumstances in which her statements were made. We agree with our appellate court that a declarant's competency is not relevant to the admission of excited utterances. *People v. Merideth* (1987), 152 Ill. App. 3d 304, 312, 105 Ill. Dec. 126, 503 N.E.2d 1132; *People v. Miller* (1978), 58 Ill. App. 3d 156, 160, 15 Ill. Dec. 605, 373 N.E.2d 1077 (each admitting excited utterances of four-year-old children found incompetent to testify).

Defendant also argues that he was deprived his right to confront Sirena as a witness against him, in violation of his Federal and State constitutional rights. He points to *Ohio v. Roberts* (1980), 448 U.S. 56, 65 L. Ed. 2d 597, 100 S.Ct. 2531, which states that "[i]n the usual case * * *, the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Once the witness has been shown to be unavailable, then the State must also prove the evidence

bears adequate "'indicia of reliability'" to be admissible. *Roberts*, 448 U.S. at 65, 65 L. Ed. 2d at 607, 100 S.Ct. at 2538-39.

The United States Supreme Court has recently addressed the question raised by defendant. In *White v. Illinois* (1992), 502 U.S. 346, 116 L. Ed. 2d 848, 112 S. Ct. 736, the Court limited its holding in Roberts by emphasizing that "'Roberts must be read consistently with the question it answered, the authority it cited, and its own facts.'" (*White*, 502 U.S. at, 116 L. Ed. 2d at 858, 112 S. Ct. at 741, *quoting United States v. Inadi* (1986), 475 U.S. 387, 394, 89 L. Ed. 2d 390, 398, 106 S. Ct. 1121, 1125.) White went on to hold that because the excited utterance exception to the hearsay rule provides unique protections as to trustworthiness, no confrontation clause concerns are raised when this exception is invoked. As the Court stated, "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." (White, 502 U.S. at, 116 L. Ed. 2d at 859, 112 S. Ct. at 743.) We find the same to be true under our own constitution. (Ill. CONST. 1970, art. I, §8.) Defendant was not, therefore, improperly denied his right to confront Sirena.

VI

Before establishing the circumstances of the victim's death, prosecutors proved a number of preliminary matters. The State first called the victim's mother, Marie Munoz, as a life and death witness. Munoz testified that the victim, Lisa, had been living with her aunt, Juanita Soto, on March 17. Soto

then testified as the second witness. Without defense objection, Soto named all of the residents of her home, including her children, Sirena and Sirena's new baby sister, Lisa, born September 13, 1987. Defendant now claims Juanita's reference to her child Lisa, named in memory of the victim, violated his rights under State law and the eighth and fourteenth amendments as an impermissible victim impact statement.

Because defense counsel did not challenge this evidence in any way either at trial or in his post-trial motion, however, this issue is waived. *People v. Free* (1988), 122 Ill. 2d 367, 119 Ill. Dec. 325, 522 N.E.2d 1184; *People v. Walker* (1985), 109 Ill. 2d 484, 94 Ill. Dec. 530, 488 N.E.2d 529 (capital cases in which claims of impropriety of victim impact statement were waived).

VII

Defendant challenges the trial court's decision to admit a photograph of Sirena Moya into evidence. Without defense objection, the prosecutors showed this exhibit to the witnesses for their identification. Counsel later objected when the exhibit was offered into evidence. The judge admitted the photograph but refused to send it to the jurors for their deliberations.

The decision to admit a photograph into evidence is best entrusted to the trial court's sound discretion. Considerable deference is accorded the exercise of that discretion on appeal. (People v. Fierer (1988), 124 Ill. 2d 176, 193, 124 Ill. Dec. 855, 529 N.E.2d 972.) Photographs, like any evidence, may be admitted into evidence when authenticated and relevant either to illustrate or corroborate the testimony of a

witness, or to act as probative or real evidence of what the photograph depicts. "[R]elevant evidence is evidence that in some degree advances the inquiry. It is material and probative. As such, it is admissible, at least prima facie. But this relevance does not ensure admissibility. There remains the question of whether its value is worth it [sic] costs. A great deal of evidence is excluded on the ground that the costs outweigh the benefits." E. Cleary, McCormick on Evidence §185, at 544 (3d ed. 1984).

In People v. Foster (1988), 119 Ill. 2d 69, 115 Ill. Dec. 557, 518 N.E.2d 82, this court addressed the question of whether photographs admitted into evidence of a child asleep in the apartment where a murder took place unfairly prejudiced defendant. The Foster decision noted that "the photographs were irrelevant and prejudicial because their admission may have suggested to the jury that it was material to a finding of guilt that the deceased left a family. Evidence indicating that the victim left a family is improper, as it is without bearing on the guilt or innocence of the accused." (Foster, 119 Ill. 2d at 88-89.) The State claims that it sought to introduce the photograph into evidence merely as cumulative evidence that Sirena was in the apartment at the time of the murder and to show that she was four years old. We find the State's justification for offering the photograph to be contrived. However, even if we assume, as defendant suggests, that the State sought to introduce the photograph into evidence merely to play upon the sympathies of the jurors, we do not believe that the photograph of Sirena prejudiced the jury's decision, particularly in light of the fact that the picture was never published and that the State did not refer to this evidence in its closing argument. While we conclude that the trial judge's acceptance of the photograph into evidence was error, we find its admission to have been harmless.

Defendant also challenges the decision of the trial court to admit a life photograph of the victim into evidence and to

send this photograph to the jurors for their deliberations during the guilt-innocence phase of the proceedings. Because defendant had not contested the fact of the victim's death, counsel reasoned, the photograph was irrelevant to any issue in the case. The trial judge overruled his objections without comment. Defendant also complains that the photograph was so unfairly prejudicial to his client's case as to amount to an abuse of discretion by the trial judge. However, in *People v. Morgan* (1991), 142 Ill. 2d 410, 461-62, 154 Ill. Dec. 534, 568 N.E.2d 755 (*rev'd on other grounds* (1992), 504 U.S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222), this court considered the very issue now raised by defendant and determined that a life photograph of the victim may be admitted as part of the corpus delicti of the murder, as well as to corroborate testimony from a "life and death" witness. We decline to overrule that holding here.

VIII

Defendant next challenges the trial court's decision to exclude hearsay evidence offered by his attorney. Counsel wanted to prove defendant denied the murder when he was interrogated by Detective McCann. Counsel also sought to prove Josephine Palomino was unable to speak to defendant at police headquarters. Defendant now argues that a constitutional right to present this evidence was denied to him.

When defendant was first questioned by Detective McCann at 10:45 p.m., defendant apparently denied the murder. After defendant was identified in a police lineup, however, and after officers noticed bloodstains on defendant and arranged for forensic testing, defendant at 1:20 a.m. admitted the

killing to Assistant State's Attorney Edens. Before calling McCann to the witness stand, the prosecutor moved in limine to preclude any hearsay evidence of defendant's initial claim of innocence. The judge sustained the motion but ruled that counsel could prove defendant made some sort of statement to McCann.

We think that there can be little doubt that any denials made to the police in this case amount to hearsay evidence. Defendant claims that he offered his exculpatory statements in order to prove "the state of mind of Detective McCann as to what he did subsequent to listening to the denial by David Smith." According to defendant's counsel, McCann, upon hearing defendant's denial, left the room and got another officer to take photographs of defendant. While it is true that statements are not hearsay unless "offered to prove the truth of the matter asserted," we have difficulty understanding how defendant's initial denial connected to Officer McCann's decision to have photographs taken of defendant or how this decision was relevant to defendant's case. Absent a showing by counsel that evidence is offered for some relevant nonhearsay purpose, we believe that the trial judge correctly concluded that the statements were being "offered to prove" the proposition that defendant did not commit the murder, "the matter asserted." As hearsay statements, they were properly refused into evidence.

Nor do we believe that defendant was, by application of the hearsay rule, denied a fair opportunity to present his case to the jury. While the compulsory process, confrontation or due process clauses of the Federal and State Constitutions assure a defendant's right to present his version of the case (*Washington v. Texas* (1967), 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (compulsory process or confrontation clause of sixth amendment); *Chambers v. Mississippi* (1973), 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (due process)), a defendant is not free to ignore the "established

rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence" (*Chambers*, 410 U.S. at 302, 35 L. Ed. 2d at 313, 93 S. Ct. at 1049). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor v. Illinois* (1988), 484 U.S. 400, 410, 98 L. Ed. 2d 798, 811, 108 S. Ct. 646, 653.

Nor do we believe that the trial judge's decision not to let defendant introduce evidence that officers prevented him that evening from seeing his girlfriend, Josephine Palomino, constituted reversible error. Palomino's testimony at the suppression hearing indicated that she sought to see defendant while he was being questioned while, at the same time, he was attempting to see her. She testified that at one point a police officer told her that she could not see defendant until he had made a statement. Defense counsel thereafter argued that this evidence tended to show that defendant's confession was made involuntarily. At both the suppression hearing and at trial, however, Detectives McCann and Koclanis testified that defendant never asked to see Palomino. Instead of calling her as a witness at trial and questioning her directly as the trial judge suggested, defense counsel called Palomino's mother in an effort to get her to repeat the conversation Palomino allegedly had with one of the officers. The trial court properly sustained the State's objection to this testimony.

IX

Defendant next points to arguments made by the State in closing which he claims were improper. While summarizing

the evidence presented, the prosecutor asked "What about Lisa Ferguson, who was a citizen of Chicago. What about Lisa Ferguson who was in this apartment alone with Sirena that night, what about her rights?" The trial judge sustained defense counsel's objection and later instructed the jury that counsel's arguments were not evidence. Defendant now claims that this remark infringed upon his rights under State and Federal law. (*See Donnelly v. De Christoforo* (1974), 416 U.S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868.) While we agree with defendant that the prosecutor's remarks at closing were improper, we find that defendant was not prejudiced by this remark.

As defendant correctly notes, this court has condemned prosecutorial references to the rights of the victim or the victim's family which tend to distract jurors from their consideration of the evidence of defendant's guilt. (See, e.g., *People v. Kokoraleis* (1989), 132 Ill. 2d 235, 285-86, 138 Ill. Dec. 233, 547 N.E.2d 202; *People v. Spreitzer* (1988), 123 Ill. 2d 1, 37, 121 Ill. Dec. 224, 525 N.E.2d 30.) Not every reference to a victim's rights will entitle a defendant to a new trial, however. Reversal of conviction is appropriate only when the overall fairness of the trial has been compromised by the prosecutor's argument. This court has specifically ruled that a prosecutor's remarks do not require reversal if the State's evidence of guilt was "substantial" rather than closely balanced. (*People v. Henderson* (1990), 142 Ill. 2d 258, 322-26, 154 Ill. Dec. 785, 568 N.E.2d 1234.) We do not believe that the evidence in this case was "closely balanced."

The prosecution's evidence of defendant's guilt was strong: (1) friends and members of the victim's family provided circumstantial evidence placing defendant near the crime scene at the time of the murder; (2) Officer Gaynor testified that Sirena Moya told her that a family friend named "David" was in the apartment that evening, and defendant's name and telephone number were found in an address book in the

victim's apartment; (3) when police officers went to defendant's apartment, they heard defendant admit killing someone that evening; (4) in a subsequent written statement, defendant described how he forced his way into Lisa Ferguson's apartment, where he stabbed her with a knife he found in the kitchen; (5) significant amounts of blood were found on defendant's body and on his clothing when arrested by police; and (6) testimony indicated that defendant tried to destroy this evidence by washing both his clothing and his hair shortly after the crime had been committed. While defense counsel insists that this evidence is "largely circumstantial and not overwhelming," we believe that this characterization of the evidence lacks candor.

When the prosecutor mentioned the rights of the victim in his closing argument, the trial court judge promptly and properly sustained counsel's objection and later reminded the jury that argument is not evidence. These actions are sufficient in most cases to neutralize any error or potential prejudice to defendant. (*People v. Jones* (1982), 94 Ill. 2d 275, 298-99, 68 Ill. Dec. 903, 447 N.E.2d 161.) Considering the strength of the State's evidence in this particular case, however, we believe that the jury's verdict was not prompted by an isolated remark which referred to the victim's rights in a vague and general manner. Because defendant's guilty verdict was supported by overwhelming evidence, including defendant's written confession, we find that the prosecution's remarks, although improper, did not deny defendant a fair trial.

Defendant next claims that because "specific guarantees of the Bill of Rights" are involved, we must analyze his claim under the standards of *Chapman v. California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824. Under this analysis the question to be answered is whether, absent the constitutional error, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict. We are unable

from defendant's briefs to discover which specific right beyond those generally guaranteed by the due process clause he claims was denied to him, however. In our view, this issue falls under the rule adopted in *Donnelly v. De Christoforo* (1974), 416 U.S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868, in which the proper analysis is simply whether the conduct has made defendant's trial "so fundamentally unfair as to deny him due process." (*Donnelly*, 416 U.S. at 645, 40 L. Ed. 2d at 438, 94 S. Ct. at 1872.) Nonetheless, we have no difficulty in finding, beyond a reasonable doubt, that the jury would have returned a guilty verdict based upon the evidence presented here absent the prosecutor's misconduct.

X

Defendant proceeded to trial on two counts of aggravated criminal sexual assault (Ill. Rev. Stat. 1989, ch. 38, par. 12-14(a)(2)) which alleged that defendant had stabbed, choked and beaten Lisa Ferguson about her body with a knife and his hands while he committed an act of sexual penetration by force or threat of force. Count XIII of the indictment specifically identified the act of sexual penetration as contact between defendant's penis and the victim's anus. Count XV alleged sexual penetration by means of insertion of an object into the victim's anus. Other counts of aggravated criminal sexual assault alleging vaginal penetration had already been nol-prossed by the State before trial. Over defendant's objection, the jury was given an instruction taken from Illinois Pattern Jury Instructions, Criminal, No. 11.65 (2d ed. Supp. 1989). The pattern instruction defines the term "sexual penetration" in the same manner as that provided by the statute:

"'sexual penetration' means any contact, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration. Evidence of emission of semen is not required to prove sexual penetration." (Emphasis added.) (Ill. Rev. Stat. 1987, ch. 38, par. 12-12(f).)

Defendant contends that, because the State did not try him on a theory of vaginal penetration of the victim, he was denied due process of law when the court failed to delete any reference to "the sex organ of another person" from this instruction.

We find defendant's arguments in this regard to be meritless. The indictment counts for which defendant was tried alleged penetration of the victim's anus, and the prosecutor urged the same theory of the crime in his closing arguments to the jury. The evidence at trial tended to show that defendant had penetrated the victim's anus during sexual assault. The victim's unclothed body was found face down on the floor and a curling iron, on which there were traces of blood, was discovered under her buttocks. In addition, traces of dried blood were found on the inside of defendant's underwear. The pathologist found tears and laceration of the victim's anus and rectum consistent with forced penetration of the anus by either a penis or object such as a curling iron. There is, then, no reasonable possibility that the jury convicted defendant on a vaginal penetration theory not presented to it. Nor do we believe that the words "sex organ of another person" could have had any bearing on the jury's decision to convict defendant. *People v. Hines* (1964), 30 Ill. 2d 152, 155-56, 195 N.E.2d 712 (jury instruction covering

nol-prossed charge did not mislead jury based upon evidence presented to them).

XI

Defendant next argues that the trial judge's decision to exclude two veniremen because he believed they had lied under oath constituted error. During voir dire examination the trial court asked each potential juror if he had ever been accused of a crime. The State had already checked the criminal histories of venire members, however, and the jurors' rap sheets apparently indicated that two venire members had been charged with criminal offenses in the past. The prosecutors revealed this information during sidebar conferences and tendered the rap sheets to defense counsel for his inspection. The trial judge then looked at the records himself, determined that the first venireman had lied, and excused him for cause on the State's motion. Later the judge questioned a second venire member about criminal conduct and this member denied that he had ever been accused of a crime. The judge refused to examine the second venireman in chambers, as defense counsel suggested at a sidebar conference, preferring instead to question him in open court to see if he had misunderstood the initial questioning. The following exchange occurred:

"COURT: Have you ever been an accused, complainant or a witness in a criminal case?

VENIREMAN: No.

COURT: You never have?

VENIREMAN: No.

COURT: Never in your life?

VENIREMAN: No."

The judge then excused this venireman for cause as well.

We decline to make a lengthy analysis of this issue, which we believe to be without merit. The veracity of those who testify during *voir dire* is a matter solely within the sound discretion of the trial judge. (*People v. Hyche* (1979), 77 Ill. 2d 229, 239, 32 Ill. Dec. 893, 396 N.E.2d 6; *People v. Cole* (1973), 54 Ill. 2d 401, 414, 298 N.E.2d 705.) The decision to excuse a potential juror because of a reasonable belief that the potential juror has lied under oath is a question clearly best left with the trial court.

XII

Having determined that defendant received a fair trial on the question of his guilt, we now turn to the sentencing phase of his hearing. Here defendant raises 11 distinct issues: (1) whether the trial court's refusal to "life-qualify" the jurors amounted to constitutional error, (2) whether testimony regarding his alleged misconduct in the Cook County jail was improperly admitted, (3) whether the admission of a life photograph of the victim at the death-sentencing stage was improper, (4) whether the trial court's decision to exclude certain evidence offered in mitigation violated defendant's rights, (5) whether the verdict form used by the trial court violated defendant's eighth amendment rights, (6) whether the instructional phrase "no significant history of prior criminal activity" is unconstitutionally vague, (7) whether comments by the prosecutor during closing arguments denied defendant his rights under the fifth, sixth, eighth or fourteenth

amendments, (8) whether the decision to allow the prosecutor to argue first and last to the jury was improper, (9) whether the imposition of the death penalty is excessive, (10) whether the trial court improperly denied defendant's request for a directed verdict of no-death after seven hours of jury deliberations and (11) whether the Illinois death penalty statute is unconstitutional. Because we find in defendant's favor on the first of these questions, we decline to address the remaining issues.

Prior to jury selection, defense counsel asked the trial judge to supplement *voir dire* examination by asking potential jurors if they would vote for the death penalty in every murder case. This request was denied. Defendant claims in his brief that this refusal to "life-qualify" or "reverse-*Witherspoon*" the jury (*see Witherspoon v. Illinois* (1968), 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770) amounted to a violation of his Federal constitutional rights under the sixth, eighth and fourteenth amendments, as well as under his corresponding State constitutional rights. The defendant made this claim in spite of this court's decisions in *People v. Morgan* (1991), 142 Ill. 2d 410, 154 Ill. Dec. 534, 568 N.E.2d 755, and *People v. Hope* (1990), 137 Ill. 2d 430, 148 Ill. Dec. 252, 560 N.E.2d 849 (trial court's refusal to life-qualify jurors on a motion by defendant held not to constitute per se error).

The United States Supreme Court has recently overruled this court's decision in *People v. Morgan*. (Morgan v. Illinois (1992), 504 U.S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222.) The Court there specifically addressed the question now at issue and held that the due process clause of the fourteenth amendment requires an Illinois trial judge to inquire, when requested to do so, whether a potential juror would automatically impose the death penalty upon conviction of defendant. Because the trial court below refused defendant's request to question the jury in this regard, defendant was

denied due process and is entitled to a new sentencing hearing.

CONCLUSION

We affirm defendant's convictions but find that the trial court's refusal to "reverse-Witherspoon" or "life-qualify" the jury over defendant's objection amounted to a violation of defendant's due process rights under the fourteenth amendment. (*Morgan v. Illinois* (1992), 504 U.S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222.) Therefore, the cause is remanded for a new sentencing hearing consistent with this opinion.

Convictions affirmed; death sentence vacated; cause remanded.

APPENDIX B

SUPREME COURT OF ILLINOIS

Docket No. 77695

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v

DAVID SMITH,
Appellant.

March 20, 1997, Opinion Filed

OPINION

JUSTICE HARRISON delivered the opinion of the court:

Defendant, David Smith, was convicted following a jury trial in the Cook County circuit court of first degree murder, aggravated criminal sexual assault and home invasion arising from the March 17, 1987, stabbing death of Lisa Ferguson. At a separate sentencing hearing, the same jury found defendant eligible for the death penalty and found that there were no factors in mitigation sufficient to preclude imposition of the death sentence. Accordingly, the trial court sentenced

defendant to death for the murder conviction and to concurrent terms of 30 years each for the aggravated criminal sexual assault and home invasion convictions.

On review, this court affirmed defendant's convictions, but found that the trial court's refusal to "life-qualify" the jury amounted to a violation of defendant's due process rights requiring vacation of the death sentence and a remand of the cause for a new sentencing hearing. *People v. Smith, 152 Ill. 2d 229, 178 Ill. Dec. 335, 604 N.E.2d 858 (1992).* The evidence presented at defendant's trial and original sentencing hearing is set forth in that opinion in detail. Therefore, only the facts necessary for understanding and adjudicating the issues in the present appeal will be discussed.

On remand, the trial court, after a new sentencing hearing, reimposed the death penalty for defendant's murder conviction. The sentence of death has been stayed pending direct review by this court. Ill. CONST. 1970, art. VI, §4(b); 134 Ill. 2d Rs. 603, 609(a). Defendant argues on appeal that numerous errors committed during both the eligibility and penalty phases of his capital resentencing deprived him of the right to a fair sentencing hearing. We first address those he cites that are associated with the eligibility phase.

Defendant initially contends that his waiver of a jury for purposes of sentencing was not knowing, intelligent or voluntary because he was not specifically advised that he was entitled to have a jury determine his eligibility for the death penalty. The record shows that, prior to the sentencing hearing, the trial court admonished defendant as follows:

"THE COURT: *** [Defendant], you understand that you have a right to have a jury make a determination as to the sentencing in this case.

Do you understand that?

[DEFENDANT]: Yes, sir.

Q. And you may, if you so choose, give that *** right up and have a judge, in this case that would be myself [*sic*], make that determination.

Do you understand that?

A. Yes, sir.

Q. In other words, that would be the difference between having a jury of twelve people hearing the facts of this case, hearing these matters, and then deciding all of them, twelve to zero, whether-with regards [*sic*] to the death penalty, whether that sentence should be imposed.

Q. Do you understand that?

A. Yes, sir, I do.

Q. That right cannot be taken away from you. You must knowingly waive that right.

Do you understand that?

A. Yes, sir.

Q. Do you wish to have a jury make that determination, or do you wish to have a judge decide?

A. I wish at this time to have the judge decide."

Defendant also executed a written waiver of jury sentencing.

Defendant argues that despite these oral and written precautions, his waiver of his right to a jury was not knowing, intelligent or voluntary because the trial court did not

admonish him as this court recommended in *People v. Albanese*, 104 Ill. 2d 504, 85 Ill. Dec. 441, 473 N.E.2d 1246 *(1984)*. We disagree. It is true that the *Albanese* court stated:

> "We suggest to trial judges that it would be preferable if, before accepting a jury waiver at a capital sentencing hearing, they would inform defendants that a sentencing jury would have to unanimously decide that the State has proved beyond a reasonable doubt the existence of a statutory aggravating factor and that there are not sufficient mitigating factors established to preclude the death sentence." *Albanese*, 104 Ill. 2d at 536.

However, it is sufficient for a valid jury waiver that the trial court explain to the defendant that he is waiving his right to have a jury consider the capital sentencing issues and that the sentencing decision would, therefore, be made by the court alone. *People v. Haynes*, 174 Ill. 2d 204, 252, 220 Ill. Dec. 406, 673 N.E.2d 318 (1996); *People v. Ramey*, 152 Ill. 2d 41, 59, 178 Ill. Dec. 19, 604 N.E.2d 275 (1992).

Although it is "preferable" for the court to admonish a defendant regarding the specific rights he is waiving at each stage of capital sentencing, this court ultimately held in *Albanese* that the sixth amendment requires no precise formula for determining whether a waiver has been knowingly and intelligently made, and that each case will turn on its own facts and circumstances. *Albanese*, 104 Ill. 2d at 535-36; *see also People v. Strickland*, 154 Ill. 2d 489, 517, 182 Ill. Dec. 551, 609 N.E.2d 1366 (1992) (there is no fixed formula that must be recited by the court prior to receiving a defendant's valid jury waiver at a capital sentencing hearing). Here, the record shows the trial court admonished defendant that he had a right to have a jury make the sentencing determination, that, after hearing "these matters," the jurors

would have to decide unanimously whether the death sentence should be imposed, and that if defendant chose to give up that right, a judge would make the sentencing determination. Defendant stated that he understood the consequences of his waiver. Additionally, we find it significant that defendant had originally been convicted of murder and sentenced to death by a jury, and thus was familiar with the jury's function in a capital sentencing hearing. *See Albanese, 104 Ill. 2d at 536.* Therefore, we are satisfied that the facts and circumstances of this case demonstrate that defendant's waiver was knowing, intelligent and voluntary.

Defendant next argues that he was denied effective assistance of counsel at his sentencing hearing because defense counsel misunderstood the eligibility issue and accordingly did not contest defendant's eligibility for the death penalty. In a related argument, defendant contends that the trial court improperly found him eligible for the death penalty where the State did not prove and the court did not find the element of intent as required under section 9-1(b)(6) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)(6) (West 1994)).

At resentencing, the State asked the court to take judicial notice that the jury had convicted defendant of murder, aggravated criminal sexual assault and home invasion, and that, given his birth date of June 26, 1963, defendant was over the age of 18 at the time of the offenses. The State requested that "based on those two findings," defendant be found eligible for the death penalty. The following colloquy then occurred:

"THE COURT: Do you have any objection to me taking judicial notice of those facts?

[DEFENSE COUNSEL]: Judge, my understanding of the opinion is that the sentencing-or the eligibility is not an issue. It's merely the sentencing."

The court then took judicial notice of those facts and found, "pursuant to the provisions of the statutes, [defendant] is eligible for the death penalty."

We agree with defendant that his counsel evidently believed, incorrectly, that the resentencing ordered by this court based upon *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222 (1992), was limited to the second phase of the proceeding. In *People v. Johnson*, 159 Ill. 2d 97, 134-35, 201 Ill. Dec. 53, 636 N.E.2d 485 (1994), we held that there was no distinction between the two stages of sentencing for purposes of the *Morgan* doctrine, because "the jury involved in any aspect of the death sentencing procedure must be fair and impartial." Thus, on remand, defendant clearly had a right to both stages of the hearing. However, we find that under the circumstances present herein, counsel's mistake as to the law did not deny defendant a fair sentencing hearing, because the trial court properly determined defendant's eligibility and the outcome of the hearing would not have differed had defense counsel contested the point.

"For the purposes of imposing the death sentence, it is incumbent upon the sentencer to determine whether an aggravating factor exists." *People v. Johnson*, 149 Ill. 2d 118, 156, 171 Ill. Dec. 401, 594 N.E.2d 253 (1992). Section 9-1(b)(6) sets forth the elements of the statutory aggravating factor of murder in the course of another felony, and includes the requirement that the defendant acted with the intent to kill or with the knowledge that his acts created a strong probability of death or great bodily harm. 720 ILCS 5/9-1(b)(6)(b) (West 1994); *Johnson*, 149 Ill. 2d at 156. Defendant argues, as did the defendant in *Johnson*, 149 Ill. 2d

at 156, that the trial court failed to make any finding that he, in performing the acts which caused the victim's death, acted with the necessary intent. Specifically, defendant argues that proof that he was convicted of murder, aggravated criminal sexual assault and home invasion and that he was over 18 at the time of the murder is insufficient to establish his eligibility for the death penalty. However, defendant was indicted and proceeded to trial on, *inter alia*, two counts of first degree murder alleging the mental states of intent or knowledge (Ill. Rev. Stat. 1987, pars. 9-1(a)(1), (a)(2)), and the jury returned a general verdict of guilty on the murder charge. See *People v. Thompkins*, 121 Ill. 2d 401, 117 Ill. Dec. 927, 521 N.E.2d 38 (1988) (where an indictment contains several counts arising out of a single transaction and a general verdict is returned the effect is that the defendant is guilty as charged in each count). In *Johnson*, under strikingly similar facts, we reasoned:

> "The jury was charged with instructions which included intentional murder, and a general verdict was returned. That raised the presumption that the jury found the defendant guilty of intentional murder. During the sentencing hearing, the trial judge took judicial notice of the jury's verdict. Since the verdict encompassed the necessary finding of intent, there was no omission on the part of the trial judge, and defendant's argument must fail." *Johnson, 149 Ill. 2d at 157.*

We believe *Johnson* to be controlling here, and hold that the trial court made the requisite finding of intent under the statute, where the court took judicial notice of the jury's verdict.

Defendant cites *People v. Ramey*, 151 Ill. 2d 498, 545-50, 177 Ill. Dec. 449, 603 N.E.2d 519 (1992), wherein this court found that a jury's general verdict would not support

imposition of the death penalty because use of the presumption that the jury found the defendant intentionally murdered the victim would deny the defendant his right to have his eligibility for the death penalty decided by a trial court or jury. Defendant's reliance on *Ramey* is misplaced. In *Ramey*, the instructions given the jury at the first stage of sentencing failed to specify that there must be a finding that the defendant acted with the intent required under section 9-1(b)(6)(b). Thus, this court declined to find that the defendant's eligibility had been established because, unlike the case before us, a statutory finding of intent was not made at sentencing. *Ramey, 151 Ill. 2d at 545-46.*

Having established that the trial court properly determined defendant's eligibility, we examine whether defense counsel's failure to contest that finding constituted ineffective assistance. A defendant alleging a violation of his sixth amendment right to effective assistance of counsel must generally meet the two-pronged test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and recognized by this court in *People v. Albanese*, 104 Ill. 2d 504, 85 Ill. Dec. 441, 473 N.E.2d 1246 (1984). Under *Strickland*, the defendant must show that: (1) his counsel's performance fell below the objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694, 80 L. Ed. 2d at 693, 698, 104 S. Ct. at 2064, 2068. A court need not determine whether counsel's performance was deficient before examining the prejudice suffered if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069; *Albanese*, 104 Ill. 2d at 527.

As an initial matter, defendant contends that because his counsel wholly failed to subject the prosecution's case to

meaningful adversarial testing at the eligibility stage of sentencing, ineffective assistance of counsel can be presumed without application of the *Strickland* test. *See United States v. Cronic, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984).* Defendant argues that counsel's concession of his eligibility for the death penalty is equivalent to the concession of a defendant's guilt that this court held constituted ineffective assistance of counsel in *People v. Hattery*, 109 Ill. 2d 449, 94 Ill. Dec. 514, 488 N.E.2d 513 (1985). However, the facts in the instant case are clearly distinguishable from those in *Hattery*. The concession by counsel in this case occurred at the sentencing hearing, not during the opening arguments at trial. "Thus, unlike *Hattery*, the question of defendant's guilt or innocence in this case had previously been 'presented to the jury as an adversarial issue.' " *People v. Holman*, 132 Ill. 2d 128, 160, 138 Ill. Dec. 155, 547 N.E.2d 124 (1989), quoting *Hattery*, 109 Ill. 2d at 464. Rather, here, as in *Holman*, counsel merely conceded the undisputed fact of defendant's murder and felony convictions. We therefore reject defendant's claim that his counsel's concession of eligibility constituted ineffective assistance under *Hattery*. *See Holman*, 132 Ill. 2d at 160-61.

We similarly find that counsel's mistaken belief that eligibility was "not an issue" did not constitute ineffective assistance under *Strickland*. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 696, 104 S. Ct. at 2066. Defendant contends that his counsel was ineffective because, at the eligibility stage, he failed to argue that defendant did not have a culpable mental state, yet later presented evidence that defendant was under the influence of alcohol and narcotics and may have experienced a transient psychotic episode at the time of the murder. In *People v. Shatner*, 174 Ill. 2d 133, 220 Ill. Dec. 346, 673 N.E.2d 258 (1996), we recently rejected this

argument raised by a defendant whose counsel, under similar circumstances, declined to make an opening statement in the eligibility phase, presented no evidence, and made no argument against a finding of eligibility. There, the sentencing court, after taking judicial notice of its presence when the jury returned a general verdict of guilty to the charges of first degree murder, armed robbery and arson, ruled that the defendant was eligible for the death penalty under section 9-1(b)(6). We held that defense counsel's actions were not ineffective, because the defendant could not show, under the second prong of *Strickland*, that there was a reasonable likelihood that, but for counsel's inaction, the result of the eligibility proceeding would have been different. *Shatner*, 174 Ill. 2d at 150.

"*Johnson* undermines defendant's claim that, had his attorney challenged his eligibility, the sentencing judge would have found that he lacked the requisite intent under the aggravating felony murder factor and was not eligible for the death penalty. *** Since the jury verdicts encompassed the necessary finding of intent, and since the trial judge took judicial notice of these verdicts, his conclusion that defendant acted with the requisite intent to be eligible for the death penalty cannot be assailed." *Shatner*, 174 Ill. 2d at 150-51.

Moreover, we note that the trial court herein heard the evidence defendant presented at trial and sentencing concerning his alcohol and narcotics ingestion and "psychotic episode" on the night of the murder, and rejected the notion that defendant's mental condition had any effect on his criminal conduct. Prior to handing down defendant's sentence, the court stated: "There is as we referred to mitigation offered. The question is, is it sufficient. Mr. Smith, you lost control. You lost control not because in our mind of

any mental condition, not because of any disease. You just went out of control." Thus, as we stated in *Shatner*:

> "From these comments, it is apparent that defendant's contention that his eligibility hearing might have been different had his counsel contested eligibility is speculative at best. Defendant thus cannot satisfy the prejudice prong of the *Strickland* test, and his claim of ineffective assistance of counsel at the eligibility phase must be rejected." *Shatner*, 174 Ill. 2d at 151.

We next consider defendant's assertions of error with regard to the second phase of his capital sentencing hearing. Defendant first argues that he is entitled to a new sentencing hearing because the record does not reflect that he waived his right to testify. The State responds that defendant has waived appellate review of this issue and, alternatively, that defendant's contention is without merit. We agree with both the State's arguments.

Section 9-1(e) of the Criminal Code of 1961 allows the defendant to testify at his capital sentencing hearing. 720 ILCS 5/9-1(e) (West 1994); *People v. Gaines*, 88 Ill. 2d 342, 376, 58 Ill. Dec. 795, 430 N.E.2d 1046 (1981). However, in the case at bar, the record shows that at no time during the hearing did defendant indicate a desire to testify in his own behalf. Nor did defendant raise this matter in his post-sentencing motion. Thus, defendant has waived this issue for purposes of appellate review. *People v. Enoch*, 122 Ill. 2d 176, 119 Ill. Dec. 265, 522 N.E.2d 1124 (1988). Notwithstanding defendant's waiver, we choose to address the merits of this issue. *See People v. Shelton*, 252 Ill. App. 3d 193, 200, 191 Ill. Dec. 827, 624 N.E.2d 1205 (1993); *People v. Raso*, 234 Ill. App. 3d 1099, 1100-01, 176 Ill. Dec. 746, 602 N.E.2d 53 (1992).

Defendant urges that this court adopt the holding of a small minority of jurisdictions which have required a defendant's waiver of the right to testify to be on the record. See *Tachibana v. State*, 79 Haw. 226, 900 P.2d 1293 (1995); Annotation, *Necessity That Waiver of Accused's Right to Testify in Own Behalf Be on the Record*, 90 A.L.R.4th 586 (1991). Illinois courts have consistently found, however, that when a defendant contends on appeal that he was precluded from testifying at trial, his conviction cannot be reversed on the basis that he was prevented from exercising that right unless he contemporaneously asserted his right to testify by informing the trial court that he wished to do so. *See People v. Thompkins*, 161 Ill. 2d 148, 177-78, 204 Ill. Dec. 147, 641 N.E.2d 371 (1994); *People v. Brown*, 54 Ill. 2d 21, 24, 294 N.E.2d 285 (1973); *Shelton*, 252 Ill. App. 3d at 201; *Raso*, 234 Ill. App. 3d at 1100; *People v. Knox*, 58 Ill. App. 3d 761, 767-68, 16 Ill. Dec. 182, 374 N.E.2d 957 (1978). Indeed, a vast majority of the states considering this question have held that a defendant's waiver of his right to testify is presumed if, as in the present case, he fails to testify or notify the court of his desire to do so. *See Shelton*, 252 Ill. App. 3d at 201, citing *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991).

Additionally, a majority of jurisdictions, and our own appellate court, have found that a trial court has no duty to advise a defendant, represented by counsel, of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred. *Shelton*, 252 Ill. App. 3d at 201; *Raso*, 234 Ill. App. 3d at 1102; *see also Martinez*, 883 F.2d at 760. Although such procedures are required to establish a valid jury waiver (725 ILCS 5/103-6 (West 1994)) or a voluntary guilty plea (725 ILCS 5/113-4(c) (West 1994); 134 Ill. 2d Rs. 402, 605), there is no need for a comparable requirement that the trial court set of record defendant's decision on this matter. As the *Martinez* court stated:

"At least seven reasons have been given for this conclusion: First, the right to testify is seen as the kind of right that must be asserted in order to be recognized. [Citation.] Second, it is important that the decision to testify be made at the time of trial and that the failure to testify not be raised as an afterthought after conviction. [Citation.] Third, by advising the defendant of his right *to* testify, the court could influence the defendant to waive his right *not to* testify, 'thus threatening the exercise of this other, converse, constitutionally explicit and more fragile right.' [Citation.] Fourth, a court so advising a defendant might improperly intrude on the attorney-client relation, protected by the Sixth Amendment. [Citation.] Fifth, there is danger that the judge's admonition would introduce error into the trial. [Citation.] Sixth, it is hard to say when the judge should appropriately advise the defendant-the judge does not know the defendant is not testifying until the defense rests, not an opportune moment to conduct a colloquy. [Citation.] Seventh, the judge should not interfere with defense strategy. [Citation.]" (Emphasis in original.) *Martinez, 883 F.2d at 760.*

For all these reasons, we join the majority of states in concluding that the trial court is not required to advise a defendant of his right to testify, to inquire whether he knowingly and intelligently waived that right, or to set of record defendant's decision on this matter.

Here, defendant does not assert that his counsel was ineffective for advising him to refrain from testifying at sentencing, nor does he indicate of what his testimony would have consisted. We recognize that the decision whether to take the witness stand and testify in one's own behalf ultimately belongs to the defendant (*Thompkins*, 161 Ill. 2d at 177; Brown, 54 Ill. 2d at 23), but it should be made with the advice of counsel (*Brown*, 54 Ill. 2d at 23-24; *Raso,* 234 Ill. App. 3d at 1101-02). Thus, in the instant case, defendant's

decision not to testify must be viewed as strategy with which he agreed. *See Thompkins*, 161 Ill. 2d at 177; *Raso*, 234 Ill. App. 3d at 1101. Accordingly, we conclude that defendant waived his right to testify because he did not contemporaneously assert his right to do so and that the trial court did not err by failing to advise defendant of his right to testify at sentencing or by failing to require that defendant's waiver of the right be incorporated in the record. *See Shelton*, 252 Ill. App. 3d at 202; *Raso*, 234 Ill. App. 3d at 1101-02.[1]

By this holding we do not imply that a defendant is no longer free to bring a post-conviction challenge based on a denial of the right to testify. However, to prevail in such a challenge, the defendant must demonstrate that he did not knowingly waive the right to testify. See *United States v. Edwards, 897 F.2d 445, 446 (9th Cir. 1990)* ("*Martinez* states that 'to waive his right [to testify], all that [the defendant] needed to know was that the right existed,' [citation] thereby implying that if the defendant had not known the right existed he might not have been able to waive it").

Defendant next contends that the trial court erred in relying on its notes from the original sentencing hearing without informing defense counsel. Richard Rizzo, a Cook County sheriff's office employee assigned to the Cook County jail,

---

[1] By this holding we do not imply that a defendant is no longer free to bring a post-conviction challenge based on a denial of the right to testify. However, to prevail in such a challenge, the defendant must demonstrate that he did not knowingly waive the right to testify. *See United States v. Edwards*, 897 F.2d 445, 446 (9th Cir. 1990) ("*Martinez* states that 'to waive his right [to testify], all that [the defendant] needed to know was that the right existed,' [citation] thereby implying that if the defendant had not known the right existed he might not have been able to waive it").

testified for the State in aggravation at both defendant's original sentencing hearing in 1989 and at the 1994 resentencing hearing which is the subject of this appeal. In 1994, Rizzo testified that he discovered a shank in a cell occupied by defendant and another inmate, and that defendant admitted it was his. During closing arguments, defense counsel stated that defendant denied ownership of the shank. In rebuttal, the State argued that defendant had admitted the shank was his and defense counsel objected, stating there was no such evidence. The trial court commented that it did not recall whether defendant admitted or denied ownership of the shank. The court then stated:

> "I just happen to have my notes which indicate as long as this has been brought out. It talks about him-and I believe his name was officer Rizzo *** recovered a shank from the defendant's cell, questioned both inmates.
>
> I guess [defendant] was there with another man named *** Rollins-never saw the defendant attack anybody or use the shank. He indicated the defendant denied that it was his shank.
>
> And then it goes on. Redirect. He was found guilty of an offense and was sanctions [*sic*] for that."

Defendant argues that the notes referred to by the trial court do not reflect Rizzo's testimony at the 1994 hearing, but his "more extensive and more aggravating" testimony at the 1989 hearing. We agree that the record on appeal, which includes a transcript of proceedings at both sentencing hearings (134 Ill. 2d R. 608), supports defendant's claim. In 1994, Rizzo did not testify that defendant denied it was his shank, was found guilty of an offense, or was sanctioned for it. Nor was Rizzo subject to redirect at the 1994 hearing.

Therefore, where the trial court's notes reflect proceedings which occurred in 1989 but not in 1994, we will presume for purposes of this appeal that the trial court was referring to its notes from the original sentencing hearing.

While the State argues that defendant has waived this issue on appeal, we find that his failure to object to the court's use of its notes is excused where defense counsel did not know at the time that the court was referring to notes from the original sentencing hearing. Although defendant also failed to include the court's reference to the 1989 notes as error in his post-sentencing motion, application of the waiver rule is less rigid where the basis for the objection is the trial court's conduct. *People v. Nevitt*, 135 Ill. 2d 423, 455, 142 Ill. Dec. 854, 553 N.E.2d 368 (1990). We choose, therefore, to examine this issue on the merits.

"The law is well settled that, exclusive of certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the exhibits offered and admitted in evidence and the record made before him in open court. Any private investigation by the court *** constitutes a denial to the defendant of the constitutional guarantee of due process of law." *People v. Rivers*, 410 Ill. 410, 416, 102 N.E.2d 303 (1951).

Further, if an accused is not informed at trial of the facts of which the court is taking judicial notice, he does not know upon what evidence he is being convicted, and he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the truth of the facts allegedly relied upon. *Garner v. Louisiana*, 368 U.S. 157, 173, 7 L. Ed. 2d 207, 219, 82 S. Ct. 248, 256-57 (1961). Thus, in the case at bar, the trial court erred in relying on notes from the previous sentencing hearing without informing the defense. The court's

brief reference to "my notes" was insufficient to inform the defense that the court was taking judicial notice of testimony presented at a prior proceeding, and thus counsel had no opportunity to challenge any deductions which might be drawn from such testimony or to dispute its truth.

However, we do not believe this error deprived defendant of due process for several reasons. First, defendant was not prejudiced by the court's reliance on Rizzo's original testimony that defendant had denied ownership of the shank, because the court's notes mirrored what defense counsel maintained during closing argument. Defense counsel argued that the shank was never in defendant's actual possession and that he denied that it was his. The court, after referring to its notes, concurred with defense counsel. Additionally, our review of the record reveals that the trial court's isolated reference to its notes was inconsequential and had no effect on the sentence it imposed on defendant. Thus, where defendant has failed to demonstrate that he would not have received the death sentence absent the court's reliance on its notes, we consider the court's error to be constitutionally insignificant. *See People v. Byron*, 164 Ill. 2d 279, 304, 207 Ill. Dec. 453, 647 N.E.2d 946 (1995) (trial court's reliance on allegedly incorrect statements in presentence report concerning capital defendant's drug use was constitutionally insignificant where defendant denied accuracy of report and court's comments on matter were isolated).

Defendant next contends that the trial court erred in considering that the jury in the original proceedings had sentenced defendant to death. During closing argument at defendant's resentencing hearing, the State urged the court to consider that essentially the same evidence had been presented to the jury in 1989 and that the jury had returned a sentence of death. A defense objection was overruled. In his post-sentencing motion, defendant alleged that the State erred in referring to the jury's finding in the first sentencing hearing

and in arguing that "the same essential evidence was balanced by 12 people." At the hearing on defendant's motion, defense counsel responded as follows to the State's position that the references to the jury's finding were "proper": "The State is arguing that somehow the jury's determination has a legitimate place in this Court's determination. That's wrong, Judge. That jury determination was thrown out by the Supreme Court. It has no validity in any aspect in this courtroom." We agree.

This court vacated the sentence of death originally imposed on defendant because the trial court's refusal to "reverse-*Witherspoon*" or "life-qualify" the jury, over defendant's objection, amounted to a due process violation. *Smith*, 152 Ill. 2d at 274. "It is elemental that the vacatur of a sentence renders the sentence null and void and of no legal effect." *People v. Brooks*, 158 Ill. 2d 260, 274, 198 Ill. Dec. 851, 633 N.E.2d 692 (1994). Further, as the United States Supreme Court has stated:

> "Although we have acknowledged that 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death," ' we have also made it clear that such decisions cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.' [Citation.]" *Johnson v. Mississippi*, 486 U.S. 578, 584-85, 100 L. Ed. 2d 575, 584, 108 S. Ct. 1981, 1986 (1988).

Here, because the jury's sentence had been vacated and was "of no legal effect," it was an irrelevant factor in the resentencing process. Thus, the State's argument urging the trial court to consider the prior death sentence was improper and the court's failure to sustain defendant's objection to that argument was error. However, we do not agree with

defendant that a new sentencing hearing is necessary, where it is apparent from the record that the trial court did not rely on the improper argument in determining to impose the death penalty. "The rule that this court will 'not lightly overturn the findings of the trial court, particularly when they are amply supported by the record,' applies to findings made during the aggravation and mitigation phase of the death penalty hearing. [Citations.]" *People v. Christiansen*, 116 Ill. 2d 96, 122-23, 107 Ill. Dec. 198, 506 N.E.2d 1253 (1987).

In the case at bar, the record clearly indicates that the trial court relied on only proper evidence in sentencing defendant. In pronouncing sentence, the court noted that it had reviewed its notes, the exhibits which had been offered and admitted, the transcripts from the prior proceedings and the doctors' reports. The court then stated that it had also considered the testimony of the witnesses presented in aggravation and mitigation, the offenses defendant had been found guilty of committing, and its own finding that defendant was eligible for the death penalty. The court further stated that it had considered the facts of the case, concluding: "In our view-and we have now seen a fair number of cases, this is in our mind *** an exceptionally brutal case." The court then noted its consideration of defendant's post-arrest behavior and the evidence presented in mitigation and held: "Considering the facts of the case, your conduct subsequent to the arrest and also your conduct after conviction, we feel that the sentence of death is appropriate; and we sentence you thereto."

It is well established that where a sentencing hearing is conducted before the trial court instead of a jury, the court is presumed to consider only competent and relevant evidence in determining sentence. *People v. Ashford*, 168 Ill. 2d 494, 508, 214 Ill. Dec. 237, 660 N.E.2d 944 (1995). This rule applies to arguments and remarks of counsel. *People v. Grodkiewicz*, 16 Ill. 2d 192, 199-200, 157 N.E.2d 16 (1959). Unless it affirmatively appears that the court was misled or

improperly influenced by such remarks and that they produced a judgment and sentence contrary to the law and the evidence, this court will not reverse. *Grodkiewicz*, 16 Ill. 2d at 200. At no point did the trial court herein refer to the sentence imposed by the jury or, in any way, indicate that it had influenced its sentencing decision. As we have noted, the express findings of the trial court contained in the record show that the court considered only the proper statutory factors in aggravation and mitigation. Thus, we find that defendant has failed to support his allegation that the trial court improperly considered the jury's finding at the original proceeding in sentencing defendant.

Defendant next argues that the trial court erred in allowing occurrence witness Sirena Moya to testify as a witness in aggravation. Defendant contends that Sirena's "testimony and her very appearance on the stand were inappropriate and overly prejudicial" and denied him a fair and reliable death penalty hearing. The State maintains that Sirena's presence at the scene of the crime makes her testimony relevant and reliable, "especially where she recognized defendant's voice from previous encounters."

At sentencing, the State called 11-year-old Sirena as a witness and defendant objected, arguing her testimony was not relevant, reliable or appropriate. The trial court overruled the objection as to relevance, and after some qualifying questions, overruled the objection as to competency. Sirena then testified that on March 17, 1987, she was four years old. About 5 p.m. on that date, her parents went to a bar and left her at home with her cousin, Lisa Ferguson. The two were watching a movie and eating popcorn in the living room when there was a knock at the kitchen door. Lisa got up and asked who it was and a voice said it was Dave. Sirena recognized the voice as a friend of her father's, David Smith, and identified defendant as that person at the sentencing hearing.

Sirena further testified that Lisa told defendant that she "couldn't let him in" the apartment, and then Lisa came back and watched the movie again. Approximately an hour later, there was another knock at the door. Lisa asked who it was and a man's voice said it was Lisa's brother Max. Sirena testified that she was walking to her bedroom as Lisa opened the door. When Sirena saw defendant at the door, alone, she "ran underneath [her] bed." Sirena next heard Lisa screaming, then heard someone say "shut up." Sirena testified that besides Lisa's screams coming from the kitchen, she heard the silverware drawer shake, and then everything went silent. About five minutes later, Sirena, still under her bed, heard water running in the bathroom. A "police lady" then came into her room, put a blanket over her head and took her to the next door neighbor's home. Sirena testified that when she saw her mother, she told her, "mommy, mommy, Lisa died." Later that night, Sirena went to the police station and picked defendant out of a lineup.

"Wide latitude is granted to the parties in introducing evidence in aggravation and mitigation at a capital sentencing hearing. The testimony presented need not satisfy the more restrictive rules of evidence that govern the guilt-innocence phase." *People v. Tenner*, 157 Ill. 2d 341, 380, 193 Ill. Dec. 105, 626 N.E.2d 138 (1993); 720 ILCS 5/9-1(e) (West 1994). Rather, the only requirement is that the evidence be relevant and reliable. *People v. Fair*, 159 Ill. 2d 51, 89, 201 Ill. Dec. 23, 636 N.E.2d 455 (1994); *Tenner*, 157 Ill. 2d at 380. The evaluation of the evidence's relevance and reliability lies within the sound discretion of the sentencing judge. *Fair*, 159 Ill. 2d at 89; *Tenner*, 157 Ill. 2d at 380. "Evidentiary rules are waived at this stage because, in determining the appropriate sentence, the sentencing authority must possess the fullest information possible concerning the defendant's life, character, criminal record and *the circumstances of the particular offense*." (Emphasis added.) *Fair*, 159 Ill. 2d at 89-90.

Applying this authority to the case at bar, we find the trial court did not abuse its discretion in allowing Sirena to testify. The testimony was relevant to "the circumstances of the particular offense," providing a vivid aural picture of the victim's terror as defendant rummaged through the silverware in search of a weapon. Further, although defendant does not challenge the reliability of Sirena's testimony, we note that the trial court conducted a preliminary in-person examination of Sirena to determine her competence to testify, as was recommended in *People v. Crews*, 38 Ill. 2d 331, 338, 231 N.E.2d 451 (1967). Further, her statements were fully corroborated by other evidence presented at the sentencing hearing. *See People v. Gosier*, 145 Ill. 2d 127, 150-52, 163 Ill. Dec. 823, 582 N.E.2d 89 (1991) (no abuse of discretion in admitting, at the second stage of a capital hearing, corroborated testimony as to hearsay statements by a 3 1/2-year-old who was present at a homicide scene).

Defendant further argues that the State called Sirena as an aggravating witness to appeal to the court's sympathies, that her appearance on the stand, "primarily as a victim of the crime," was more prejudicial than probative, and that the State's commentary on her testimony during closing arguments heightened the prejudicial effect of her testimony. It is true that the State argued in closing that Sirena's testimony was "compelling" because:

> "It took a lot for her to get up there and recount this. Because not only was Lisa Ferguson a victim of this man, [Serina] is a victim, too. Because she has to go through her life remembering this.
>
> To be subject to such a horrible, horrendous crime at the age of four and have to live with it for the rest of your life, your Honor, is outrageous."

However, this court has ruled that certain victim impact evidence may be admitted during the sentencing phase, reasoning that it is relevant to a consideration of the appropriate punishment for a capital defendant for the sentencing authority to have before it evidence of the specific harm caused by the defendant. *People v. Hobley*, 159 Ill. 2d 272, 316, 202 Ill. Dec. 256, 637 N.E.2d 992 (1994); *People v. Howard*, 147 Ill. 2d 103, 158, 167 Ill. Dec. 914, 588 N.E.2d 1044 (1991). Therefore, although evidence of any psychological trauma suffered by Sirena would be more appropriately addressed by an expert witness rather than by Sirena herself (*see People v. Pavlovskis*, 229 Ill. App. 3d 776, 783, 172 Ill. Dec. 226, 595 N.E.2d 587 (1992)), we decline to find that use of her testimony as victim impact evidence was so prejudicial that it rendered the sentencing hearing fundamentally unfair. *See Payne v. Tennessee*, 501 U.S. 808, 825, 115 L. Ed. 2d 720, 735, 111 S. Ct. 2597, 2608 (1991).

We next examine defendant's contention that the trial court erred in considering unsupported and irrelevant factors in aggravation. Defendant argues that the trial court exaggerated the "primary evidence in aggravation" by commenting, in imposing sentence, that Lisa Ferguson was stabbed "numerous times" and that there were "in excess of 50 sites of trauma" on her body. Defendant cites, as an additional misstatement of fact, the trial court's comment that "there is also at least an inference that [defendant] knew that at least one small child was there." Defendant also argues that because defendant did not know Sirena Moya was present at the time of the offense, the court erred in overruling defendant's relevancy objection when the State asked a defense witness if he was aware the murder was committed in the presence of a small child. The State argues that defendant has waived review of this issue, and we agree that defense counsel's objections at sentencing are incomplete and the allegation in the post-sentencing motion is lacking in specificity. *See Enoch*, 122 Ill. 2d at 186. However, as we

have noted, application of the waiver doctrine is less rigid where the basis for the objection is the trial court's conduct. *Nevitt*, 135 Ill. 2d at 455. Thus, we choose to address the merits of the issue.

It is clear that reliance on an improper factor in imposing the death penalty requires resentencing because of the "profound importance" of the trial court's role in weighing aggravating and mitigating factors. *People v. Hayes*, 139 Ill. 2d 89, 154, 151 Ill. Dec. 348, 564 N.E.2d 803 (1990); *People v. Brownell*, 79 Ill. 2d 508, 535, 38 Ill. Dec. 757, 404 N.E.2d 181 (1980). Our review of the record reveals, however, that the trial court herein based its sentence of death on evidence properly before it.

First, the trial court's observation that defendant had stabbed the victim "numerous times" was supported by the testimony of the medical examiner. Dr. Nancy Jones stated that the victim had sustained "sharp injuries," including three stab wounds and two incised wounds. Indeed, where "multiple stab wounds with strangulation contributing" was Dr. Jones opinion as to the cause of death, we find no inaccuracy in the court's comment. Similarly, the court's recollection of "in excess of 50 sites of trauma" on the victim's body was not error where it is apparent from the record that the "sites of trauma" were profuse. Although Dr. Jones' testimony does not provide their exact number, she stated that, in addition to the "sharp injuries," the victim had "numerous blunt trauma injuries *** to the head, the trunk and the extremities." Dr. Jones further testified: "In my autopsy protocol I list about 29 separate areas of injury. There were more than 29 injuries because in some areas I described more than one injury." The trial court also noted defendant's own statement, made after his arrest, that "he was glad that [the victim] had died because he didn't want her to live remembering how bad [*sic*] he had beaten her." Thus, the exact number of injuries was immaterial where that fact

would not have changed the trial court's valid conclusion, based on the evidence presented, that this was "an exceptionally brutal case."

Defendant further claims the trial court considered the unsupported and irrelevant factor that defendant knew four-year-old Sirena Moya was in the apartment at the time of the murder. In imposing sentence, the trial court remarked: "[Defendant] broke into the apartment of a friend to steal a VCR *** . He knew that the victim was alone. And there is also at least an inference that he knew that at least one small child was there." It is therefore clear that the court considered both factual possibilities in sentencing defendant. We see no error in this finding where, contrary to defendant's contention, the record provides support for both conclusions. Testimony at both defendant's trial and sentencing established that he was a "family friend" of the Moyas. Thus, it may be inferred that he knew the couple had a small daughter who was not with them at the bar that evening and was likely at home. Additionally, Sirena testified that when Lisa Ferguson opened the apartment door, she saw defendant and then ran and hid in her bedroom. This testimony raises the inference that when the door opened, defendant likewise saw Sirena. The record shows that the trial court properly weighed the evidence presented in aggravation and mitigation.

Defendant next argues that the trial court erred in finding there was no competent evidence that self-defense justified defendant's act of throwing scalding water at men on two separate occasions while imprisoned. Defendant also contends the manifest weight of the evidence supported his self-defense claim over the trial court's conclusion that defendant "just went out of control."

At the sentencing hearing, Robert Green, an officer with the Illinois Department of Corrections assigned to the "condemned unit" at Pontiac, testified that on May 14, 1992, he heard an inmate named Neal yelling and saw him with his

clothes wet and blisters forming on his arms. Hot steam rose from Neal's clothing and water dripped from the bars of defendant's cell. Green asked Neal what happened and Neal said he "got burnt." Green then heard defendant say, "I got the last laugh." When other officers arrived on the scene, defendant, in anticipation of being disciplined, had his belongings packed and was ready to move. Defendant handed his "stinger," a coil used to heat water, to an officer. Following a hearing on the incident, defendant received six months' segregation and had his "grade classification" changed. Green testified that as a standard precaution taken when an inmate is identified as a possible victim, Neal, who had been a laundryman and free to walk the gallery uncuffed, lost his job and was placed back in his cell "like a regular ordinary resident of death row." Green stated that although the incident was "no accident," no one ever learned what the problem was between defendant and Neal.

Brian Upchurch, another Department of Corrections Officer assigned to the condemned unit at Pontiac, testified at sentencing that on November 11, 1992, defendant threw boiling water on him as he walked past defendant's cell. The water, which Upchurch thought smelled of urine, hit him on the left side of his face, neck, shoulder, and back. Defendant told Upchurch, "Now, quit walking around like a peacock,"and stated that Upchurch was not as tough as he thought he was. Upchurch was treated for burns, but did not suffer any permanent disability. As defendant was being taken from his cell to segregation, the resident in the next cell threw boiling liquid on defendant and the officers escorting him.

Upchurch further testified that just prior to this incident, a condemned unit inmate named Aaron Patterson had been placed in segregation as a result of a complaint about his monopolizing the telephone. Upchurch stated that he did not know why Patterson would believe that his segregation

initiated with defendant and Upchurch, and denied that defendant ever approached him in an effort to straighten out any misunderstanding other inmates had about defendant informing on them to Upchurch. Upchurch testified that as a result of this scalding incident, defendant's classification was downgraded, he was placed in segregation for a year, and he was also prosecuted and convicted for aggravated battery.

Dr. Lawrence Heinrich, a clinical psychologist, testified that he was asked by defense counsel to evaluate defendant for purposes of gathering evidence in mitigation. Dr. Heinrich reviewed various documents, interviewed defendant and others, and administered four psychological tests. Dr. Heinrich concluded, *inter alia*, that defendant could function and adjust in the structure of an incarcerated setting. Asked about the scalding incidents, Dr. Heinrich stated that they were examples of "the way he was surviving there." Dr. Heinrich distinguished inmates like defendant, who are fearful and "counterphobic" and do things to protect themselves, and inmates who are "overtly predatory and aggressive." Dr. Heinrich stated that from defendant's description of the scalding incidents, "he was attempting to protect himself and [gain] some status with people who [*sic*] he felt could protect him, and also to retaliate against a guard whom *** he perceived or they perceived to be excessively aggressive with other inmates."

Dr. George Savarese, a licensed clinical social worker, testified in mitigation that he compiled a psychosocial developmental history of defendant. Dr. Savarese reviewed various records and documents, and interviewed defendant and other sources. Dr. Savarese concluded, *inter alia*, that defendant could adapt to incarceration. Asked about the two scalding incidents, Dr. Savarese said it was his understanding that Neal and defendant had quarreled and defendant believed he might be in danger. Defendant threw hot water on Neal in order to protect himself and so that "the system would

separate them and [defendant] wouldn't have to be exposed to [Neal] anymore." In the other instance, it was Dr. Savarese's understanding that defendant had been labeled as a "snitch" after another inmate was disciplined for abusing telephone privileges. Defendant told Dr. Savarese that he tried to discuss the situation with the guard and the guard "just laughed him off and didn't really listen." Defendant felt that if he could get back at the guard it would show that he was not a "snitch." Dr. Savarese testified that the two incidents were "an aggressive way of protecting one's self" which showed defendant's poor judgment and heightened fearfulness, rather than any malicious or predatory nature.

As previously noted, in imposing sentence, the trial court stated that on the date of the murder defendant "just went out of control." The court continued:

> "You did not just do it on March 17, you did it again. You did it again on at least two occasions in our mind. And we don't by [*sic*] this, that he was a snitch and he was doing this to show-I don't think that was the case. And I don't think there is any compitent [*sic*] evidence of that."

Defendant contends that the court erred in concluding there was no competent evidence that the scalding incidents were acts of self-defense, where defendant's account of the incidents to Drs. Savarese and Heinrich was credible and uncontradicted.

Defendant cites *People v. Jordan*, 4 Ill. 2d 155, 163, 122 N.E.2d 209 (1954), for the general proposition that the finder of fact cannot disregard a defendant's version of what occurred unless it is improbable, uncorroborated or contradicted in its material parts. According to defendant, the court erred in not believing his explanation and, instead,

applying its own characterization to what occurred. However, the trial court is permitted to draw reasonable inferences from the evidence introduced during trial. *People v. Ward*, 154 Ill. 2d 272, 339, 181 Ill. Dec. 884, 609 N.E.2d 252 (1992). Here, where the officers testified that after throwing scalding water on his victims defendant said, "I got the last laugh," and "quit walking around like a peacock," a reasonable inference may be made that defendant's actions were motivated by maliciousness and uncontrolled anger, rather than self-defense. Thus, the trial court's finding that defendant "just went out of control" was not against the manifest weight of the evidence. *See Christiansen*, 116 Ill. 2d at 122 (supreme court will not lightly overturn trial court's findings during aggravation and mitigation phase of death penalty hearing).

Further, although defendant claims that the trial court was not free to disregard the doctors' testimony (*see In re Ashley K.*, 212 Ill. App. 3d 849, 890, 156 Ill. Dec. 925, 571 N.E.2d 905 (1991) (the circuit court cannot disregard expert medical testimony that is not countervailed by other competent medical testimony or medical evidence)), the credibility and weight to be given this testimony was for the trial court as trier of fact (*People v. Oaks*, 169 Ill. 2d 409, 467, 215 Ill. Dec. 188, 662 N.E.2d 1328 (1996)). Where both Dr. Heinrich and Dr. Savarese admitted that their interpretations of the scalding incidents came from defendant, and we have concluded that the trial court could reasonably reject his account based on the evidence and inferences therefrom, we cannot say that the trial court abused its discretion in finding there was no competent or credible evidence to support defendant's self-defense claim. *See Oaks*, 169 Ill. 2d at 468.

Defendant next contends that he was denied a fair and reliable sentencing hearing because the trial court failed to consider in mitigation the testimony of Josephine Palomino, defendant's former girlfriend and the mother of his son. At

sentencing, defendant called three witnesses in mitigation and stipulated to the testimony of four mitigation witnesses who had testified at the original sentencing hearing. In presenting its reasons for imposing the death penalty, the trial court stated that it had considered "the testimony of the two individuals called in mitigation" and included in its discussion the mitigation testimony of the two doctors. Defendant argues that the court forgot or refused to consider the mitigating testimony of the third witness, Palomino. Although the State contends that defendant has waived review of this issue by failing to make an objection at sentencing, the record shows defense counsel attempted to preserve the issue through its inclusion in the post-sentencing motion, and, once again, application of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct. *Nevitt*, 135 Ill. 2d at 455.

It is clear that while the sentencer in a capital case may determine the weight to be given relevant mitigating evidence, it may not give such evidence no weight by excluding it from consideration. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15, 71 L. Ed. 2d 1, 10-11, 102 S. Ct. 869, 877 (1982); *People v. Munson*, 171 Ill. 2d 158, 193, 215 Ill. Dec. 125, 662 N.E.2d 1265 (1996). Here, however, despite defendant's contentions, we are unconvinced that the trial court failed to consider Palomino's mitigating testimony simply because he failed to specifically mention it in imposing sentence. This court has held that a sentencer in a capital proceeding is not required to make specific findings as to the aggravating and mitigating factors it relied upon in reaching its verdict. *People v. Gaines*, 88 Ill. 2d 342, 383-84, 58 Ill. Dec. 795, 430 N.E.2d 1046 (1981); *People v. Brownell*, 79 Ill. 2d 508, 541-44, 38 Ill. Dec. 757, 404 N.E.2d 181 (1980). This court has further stated:

"Although the requirement of an explanation or designation by the sentencing authority of certain reasons necessary for imposition of the death penalty has been noted with approval in decisions upholding the validity of death penalty statutes [citations], this court consistently has held that a statement of findings is not constitutionally required in the second part of a sentencing hearing [citations]. Meaningful review can, and does, occur in its absence *** ." *People v. King*, 109 Ill. 2d 514, 550-51, 94 Ill. Dec. 702, 488 N.E.2d 949 (1986).

In imposing sentence herein, the trial court declared several times that it had reviewed its notes, which would encompass Palomino's "live" testimony, and the transcripts submitted from the prior proceeding, which would include Palomino's previous testimony entered by stipulation. We agree with the State that the court's failure to discuss Palomino's testimony was most likely due to the fact that the court had considered her testimony and given it little weight. *See Jackson v. Roth*, 24 F.3d 1002, 1005 (7th Cir. 1994) (the "predictable" testimony of relatives is usually favorable and receives little weight at sentencing hearings as a result). Thus, we find no error in the court's omission.

Defendant next contends that the trial court improperly failed to consider nonstatutory mitigating factors and limited the two statutory mitigating factors it did consider. Careful examination of the record shows, however, that the trial court weighed all of the mitigation evidence defendant presented and found it insufficient to preclude imposition of the death penalty. Section 9-1(c) of the Criminal Code of 1961 provides, in pertinent part:

"The court shall consider *** any mitigating factors which are relevant to the imposition of the death penalty. ***

Mitigating factors may include but need not be limited to the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution." 720 ILCS 5/9-1(c) (West 1994).

In pronouncing sentence herein, the trial court made the following comments with regard to evidence in mitigation:

"We consider the matters which were alluded to in opening argument, are alluded to once again in closing and were testified to during those proceedings.

Number 1, that the defendant prior to this incident had-there was no evidence of a prior criminal activity. *** However, we must temper that a little bit because there was at least testimony*** regarding some incidents of prior criminal activity at his younger years.

We have also *** received evidence and testimony regarding an additional factor *** not testified to at the original proceeding, that being the testimony of the doctors regarding what they view and what they interpret as [defendant's] condition of a boarderline [*sic*] personalty disorder and a schizotypo *** disorder.

* * * *

We do not feel there is *** any evidence of any mental disease. *** Maybe I ought to correct that, and say organic mental disease. *** We just don't think there is any evidence

of any mental disease or disorder caused by anything of that nature.

* * * *

There is as we referred to mitigation offered. The question is, is it sufficient. Everyone has stresses. [Defendant], you lost control. You lost control not because in our mind of any mental condition, not because of any disease. You just went out of control."

First, defendant contends that the court's comments indicate it considered only the two statutory factors in mitigation alluded to in defense counsel's opening statement, but not the nonstatutory factors that were mentioned, such as the value of defendant's life and his troubled background. We believe it is clear from a reading of the court's comments as a whole that, in the prefatory statement quoted above, the court meant it was considering *all* the mitigating "matters which were alluded to in opening argument *** and were testified to during those proceedings," and not just the statutory mitigating factors which it chose to specifically mention. See *Gaines, 88 Ill. 2d at 383* (capital sentencer is not required to make specific findings of what aggravating and mitigating factors it relied upon in reaching its verdict).

Second, defendant argues the trial court improperly limited the statutory mitigating factor set forth in section 9-1(c)(1) to "no evidence of a prior criminal activity," and indicated it was not present in light of testimony "of prior criminal activity at his younger years." Defendant has misinterpreted the court's remarks, which, fairly read, properly addressed whether defendant had "no significant history of prior criminal activity" under section 9-1(c)(1). 720 ILCS 5/9-1(c)(1) (West

1994). Defendant presented evidence at sentencing that he committed shoplifting and burglary when he was 12 to 14 years of age. This court has held that the sentencer may consider in aggravation evidence of a defendant's prior misconduct, including juvenile delinquency, "although the misconduct may not have resulted in prosecution or conviction." *People v. Lego*, 116 Ill. 2d 323, 346-47, 107 Ill. Dec. 647, 507 N.E.2d 800 (1987); *see also In re W.C.*, 167 Ill. 2d 307, 341, 212 Ill. Dec. 563, 657 N.E.2d 908 (1995). Therefore, here, we find no error where the trial court first found the presence of the statutory mitigating factor, and then "tempered" that finding by noting evidence of defendant's juvenile misconduct.

Third, defendant argues the trial court improperly limited the statutory mitigating factor set forth in section 9-1(c)(2) to insanity arising from an organic mental disease. Dr. Savarese testified in mitigation that defendant had a borderline personality disorder with schizotypal features, possibly caused by either a mental illness or brain damage. Dr. Savarese further testified that, in his professional opinion, defendant was suffering an extreme mental and emotional disturbance, possibly a "transient psychotic episode," at the time he murdered Lisa Ferguson. Dr. Heinrich testified in mitigation that defendant suffered from long-standing emotional and personality deficiencies, the most prominent of which were borderline personality and schizotypal personality disorders. Dr. Heinrich concluded that these deficiencies, exacerbated by defendant's drug and alcohol abuse, severely impaired his judgment at the time of the murder.

Defendant argues that the court's comments regarding the absence of any "organic mental disease" in defendant are irrelevant to whether the statutory mitigating factor of "extreme mental or emotional disturbance" existed. This is true. However, it is defendant who presented the testimony concerning the possibility of organic disorders or brain

damage. The trial court was simply stating that it did not believe there was "any evidence" to support a finding "of any [organic] mental disease or disorder caused by anything of that nature." The court specifically addressed the statutory mitigating factor when it later stated: "Everyone has stresses. [Defendant], you lost control. You lost control not because in our mind of any mental condition, not because of any disease. You just went out of control." It is clear that the court differentiated between the two separate mental condition arguments made by defendant. We therefore find no impropriety in the court's rejection of the section 9-1(c)(2) mitigating factor of "extreme mental or emotional disturbance." 720 ILCS 5/9-1(c)(2) (West 1994); see *Oaks, 169 Ill. 2d at 467* (although expert testimony as to presence of statutory mitigating factor was unrebutted, the credibility and weight to be given the testimony were for the trial court as trier of fact).

We next address defendant's contention that the trial court applied an unconstitutionally vague standard in sentencing defendant to death. In concluding its remarks, the trial court stated: "Considering the facts of the case, your conduct subsequent to the arrest and also your conduct after conviction, we feel that the sentence of death is appropriate; and we sentence you thereto." Defendant argues that the factors cited by the trial court are nonspecific, and equate and commingle the offense for which defendant was being sentenced with his post-offense conduct. However, a defendant's post-offense conduct is relevant at the aggravation-mitigation stage of a death penalty hearing (*People v. Hope*, 168 Ill. 2d 1, 38, 212 Ill. Dec. 909, 658 N.E.2d 391 (1995)), and nothing in the record indicates that the court further used this factor as an unconstitutional basis for imposing the death penalty herein.

Defendant also argues that the trial court's use of the word "appropriate" in imposing the death penalty indicates that the

court added a "second 'appropriateness' tier to the sentencing process," a practice that this court has rejected. *People v. Albanese*, 104 Ill. 2d 504, 536-37, 85 Ill. Dec. 441, 473 N.E.2d 1246 (1984). However, it is clear from the record that the trial court acknowledged the existence of the two statutorily mandated phases of capital sentencing in Illinois, and then applied both phases to the facts of defendant's case, stating:

"We began these proceedings with the eligibility phase. And based upon the convictions and also the fact that at the time [defendant] had attained the age of 21, he was eligible for the death penalty.

As we stated, we reviewed the transcripts submitted to us. We have reviewed our notes. The question now before us is whether there are *** mitigating factors sufficient to preclude the imposition of the death penalty."

The trial court made no mention of an additional tier, or of a "final test." After considering the evidence in aggravation and mitigation, the court imposed the death penalty, a sentence it characterized as "appropriate." Rather than applying an unconstitutionally vague standard, we interpret the court's use of "appropriate" to mean the death penalty was "proper," "correct," and "suitable." Indeed, this court has found the death penalty to be "appropriate" numerous times. *See People v. Bounds*, 171 Ill. 2d 1, 71, 215 Ill. Dec. 28, 662 N.E.2d 1168 (1995); *People v. Taylor*, 166 Ill. 2d 414, 432, 211 Ill. Dec. 518, 655 N.E.2d 901 (1995); *People v. Christiansen*, 116 Ill. 2d 96, 129, 107 Ill. Dec. 198, 506 N.E.2d 1253 (1987).

Defendant next asserts that his death sentence is "excessive, disproportionate, and inappropriate" given his

character and history and the circumstances of the offense. We disagree. First, with regard to defendant's claim that his sentence is "disproportionate," we note that "comparative proportionality review in death penalty cases is not required by the United States Constitution (*Pulley v. Harris* (1984), 465 U.S. 37, 79 L. Ed. 2d 29, 104 S. Ct. 871) and is not a feature of the capital sentencing process in Illinois (*People v. Jimerson* (1989), 127 Ill. 2d 12, 54, 129 Ill. Dec. 124, 535 N.E.2d 889)." *People v. Page*, 156 Ill. 2d 258, 270, 189 Ill. Dec. 371, 620 N.E.2d 339 (1993). We therefore decline defendant's invitation to compare the sentence in the case before us with penalties imposed in similar cases. *See People v. Perez*, 108 Ill. 2d 70, 92, 90 Ill. Dec. 932, 483 N.E.2d 250 (1985).

Next, we agree with defendant that analysis of the propriety of the death penalty requires an individualized consideration of the circumstances of the offense and of the character and background of the offender. *Eddings v. Oklahoma*, 455 U.S. 104, 110-12, 71 L. Ed. 2d 1, 8-9, 102 S. Ct. 869, 874-75 (1982); *People v. Shatner*, 174 Ill. 2d 133, 161, 220 Ill. Dec. 346, 673 N.E.2d 258 (1996). In deciding whether the death penalty is excessive in a particular case, this court examines whether the circumstances of the crime and the character of the defendant are such that the deterrent and retributive functions of the "ultimate sanction" will be served by its imposition. *Shatner*, 174 Ill. 2d at 161.

Defendant was convicted of murder, aggravated criminal sexual assault and home invasion. The circumstances of the offense presented herein are that defendant went to the apartment where Lisa Ferguson was babysitting with the intent to steal a videocassette recorder. Defendant was denied entrance to the apartment, but returned later with the express purpose of murdering Ferguson. Defendant forced his way into the apartment and sexually assaulted, stabbed and strangled Ferguson. Defendant inflicted over 30 wounds to

Ferguson's body, including penetrating her anus with his penis or the curling iron found beneath her. Additionally, the court heard character evidence that defendant had a history of theft, shoplifting and burglary dating back to when he was a juvenile, although he was never convicted of any of these offenses. Defendant also had an extensive history of drug abuse, but had repeatedly refused drug counselling when his girlfriend urged him to seek help. Since being incarcerated, defendant had scalded another inmate and a correctional officer with boiling water, and a shank was found in his cell on two occasions.

In contrast, the evidence defendant presented in mitigation consisted mainly of testimony that he had had a troubled childhood, that he had a good relationship with his son, born one month after the murder, and that at the time of the offense his judgment was severely impaired because he was under the stress of impending marriage and fatherhood and was suffering from emotional and personality deficiencies which were exacerbated by his drug and alcohol abuse. We find that the trial court's determination that the aggravation evidence outweighed the mitigation evidence is supported by the record. We therefore conclude that imposition of the death penalty was not excessive or inappropriate under the particular facts and circumstances of this case.

Finally, defendant contends that the Illinois death penalty statute is unconstitutional because it does not sufficiently minimize the risk of arbitrarily or capriciously imposed death sentences. Defendant concedes that this court has reviewed many of the issues he raises, and has resolved them adversely to his position. We continue to adhere to those holdings. See *People v. Cole*, 172 Ill. 2d 85, 114-15, 216 Ill. Dec. 718, 665 N.E.2d 1275 (1996) (rejecting the arguments the statute is invalid for the discretion it affords the prosecutor in deciding to request the death penalty in a particular case, for failing to require the prosecution to provide the defense with pretrial

notice of the aggravating evidence to be used at capital sentencing, or for not requiring the sentencer to make a written statement of its findings); *People v. Hooper*, 172 Ill. 2d 64, 84, 216 Ill. Dec. 633, 665 N.E.2d 1190 (1996) (rejecting the argument the statute is unconstitutional because it does not require the sentencer to make an ultimate determination that death is the appropriate punishment); *People v. Taylor*, 166 Ill. 2d 414, 439, 211 Ill. Dec. 518, 655 N.E.2d 901 (1995) (rejecting the argument the statute unconstitutionally allows the sentencer to consider "any" aggravating factor); *People v. Strickland*, 154 Ill. 2d 489, 538-39, 182 Ill. Dec. 551, 609 N.E.2d 1366 (1992) (rejecting the argument defendant has the burden of proof). Defendant urges us to give "renewed attention" to the question of whether the statute provides adequate judicial review. We likewise decline to revisit this argument, having repeatedly held that the statute provides sufficient information-gathering procedures to insure adequate appellate review of death sentences. *People v. Bounds*, 171 Ill. 2d 1, 72, 215 Ill. Dec. 28, 662 N.E.2d 1168 (1995); *People v. Albanese*, 104 Ill. 2d 504, 541-42, 85 Ill. Dec. 441, 473 N.E.2d 1246 (1984).

Defendant also raises a question he contends this court has not considered, namely, whether the use of the plural in the statutory phrase "no mitigating *factors* sufficient to preclude the imposition of the death sentence" prevents the sentencer from finding a single mitigating factor is sufficient to preclude death. (Emphasis added.) 720 ILCS 5/9-1(h) (West 1994). However, it is well established that, in Illinois, the sentencer's belief "that any one mitigating factor sufficient to preclude the death penalty exists is sufficient to do so." *People v. Ramey*, 152 Ill. 2d 41, 77, 178 Ill. Dec. 19, 604 N.E.2d 275 (1992); *see also People v. Brown*, 172 Ill. 2d 1, 58-59, 216 Ill. Dec. 733, 665 N.E.2d 1290 (1996). "As such, Illinois' death penalty procedure clearly provides for meaningful consideration of any and all mitigating factors." *Ramey*, 152 Ill. 2d at 77. Further, where, as here, the trial

court is the sentencer, it is presumed to know the law and apply it properly, and its decision regarding sentencing will be presumed to be proper absent an affirmative showing of error. *See People v. Askew*, 273 Ill. App. 3d 798, 805, 210 Ill. Dec. 65, 652 N.E.2d 1041 (1995). Accordingly, defendant has raised no arguments to persuade us to reconsider our conclusion that the death penalty statute insures adequate safeguards to prevent the arbitrary or capricious imposition of the penalty. *See People v. Shatner*, 174 Ill. 2d 133, 162-63, 220 Ill. Dec. 346, 673 N.E.2d 258 (1996), *citing People v. Kubat*, 94 Ill. 2d 437, 69 Ill. Dec. 30, 447 N.E.2d 247 (1983).

For the reasons stated, the judgment of the circuit court of Cook County is affirmed. The clerk of this court is directed to enter an order setting Tuesday, September 9, 1997, as the date on which the sentence of death entered in the circuit court of Cook County is to be carried out. The defendant shall be executed in the manner provided by law. 725 ILCS 5/119-5 (West 1994). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution where defendant is confined.

Affirmed.

APPENDIX C

SUPREME COURT OF THE
UNITED STATES

97-5599

DAVID SMITH

v.

ILLINOIS

October 14, 1997, Decided

OPINION:

The petition for writ of certiorari is denied.

APPENDIX D

SUPREME COURT OF ILLINOIS

Docket No. 86775

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v

DAVID SMITH,
Appellant.

December 1, 2000
Opinion Filed

OPINION

JUSTICE McMORROW delivered the opinion of the court:

Defendant, David Smith, appeals from an order of the circuit court of Cook County dismissing his amended petition for post-conviction relief without an evidentiary hearing. Because defendant was sentenced to death for the underlying

convictions, his appeal lies directly to this court. 134 Ill. 2d R. 651(a). For the reasons that follow, we affirm the judgment of the circuit court.

BACKGROUND

This court has previously set forth the evidence presented at defendant's trial in our opinion on defendant's first direct appeal. *See People v. Smith*, 152 Ill. 2d 229, 178 Ill. Dec. 335, 604 N.E.2d 858 (1992). Therefore, we discuss only those facts and evidence necessary to the disposition of this appeal. Defendant's convictions arise from the murder of Lisa Ferguson. On the evening of March 17, 1987, defendant entered the home where the victim was staying, and beat, strangled and stabbed her multiple times, while her four-year-old cousin hid in a bedroom. In addition, defendant sexually penetrated the victim's anus. Defendant was subsequently arrested and provided a statement in which he admitted killing the victim. A jury found defendant guilty of first degree murder, aggravated criminal sexual assault, and home invasion. At a separate sentencing hearing, the same jury found defendant eligible for the death penalty, and further found that there were no mitigating factors sufficient to preclude the imposition of the death penalty. Defendant was sentenced to death.

On direct appeal, this court affirmed defendant's convictions, but vacated defendant's sentence and remanded the cause for a new sentencing hearing, due to the circuit court's failure to "life-qualify" the jury, pursuant to *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492, 112 S. Ct. 2222 (1992). *Smith*, 152 Ill. 2d at 274. On remand, defendant waived a jury for sentencing and the same judge that presided over defendant's trial again imposed the death penalty for defendant's murder conviction. This court affirmed

defendant's death sentence. *People v. Smith*, 176 Ill. 2d 217, 261, 223 Ill. Dec. 558, 680 N.E.2d 291 (1997). On December 21, 1995, defendant filed a *pro se* petition for post-conviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998)). Thereafter, on December 6, 1997, defendant filed an amended petition for post-conviction relief. After hearing arguments, the circuit court denied defendant's petition without an evidentiary hearing.

ANALYSIS

The Post-Conviction Hearing Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trial or sentencing hearing. *People v. Towns*, 182 Ill. 2d 491, 502, 231 Ill. Dec. 557, 696 N.E.2d 1128 (1998). An action for post-conviction relief is not an appeal from the underlying judgment, but rather a collateral proceeding. *Towns*, 182 Ill. 2d at 502. A post-conviction proceeding allows inquiry into constitutional issues involved in the conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal. *Towns*, 182 Ill. 2d at 502.

A defendant is not entitled to an evidentiary hearing on a post-conviction petition as a matter of right. *People v. Hobley*, 182 Ill. 2d 404, 427-28, 231 Ill. Dec. 321, 696 N.E.2d 313 (1998). Rather, an evidentiary hearing is warranted only where the allegations of the post-conviction petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional rights have been violated. *Hobley*, 182 Ill. 2d at 428. In determining whether to grant an evidentiary hearing, all well-pled facts in the petition and any

accompanying affidavits are taken as true. *Towns*, 182 Ill. 2d at 503. A trial court's dismissal of a post-conviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389, 233 Ill. Dec. 789, 701 N.E.2d 1063 (1998).

I. Timeliness of Post-Conviction Petition

The State contends in its brief that defendant did not file his petition within the time limitations prescribed by the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1998)). At oral arguments, however, the State conceded that defendant did, in fact, file his petition in a timely manner. Therefore, we do not address this issue.

II. Ineffective Assistance of Counsel

Defendant raises a series of challenges to his trial counsel's performance. A defendant is guaranteed the effective assistance of counsel at trial and at a death sentencing hearing. *Strickland v. Washington*, 466 U.S. 668, 686-87, 80 L. Ed. 2d 674, 692-93, 104 S. Ct. 2052, 2063-64 (1984). To establish a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064.

In order to satisfy the deficient-performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate that counsel was not

functioning as the "counsel" guaranteed by the sixth amendment. Counsel's performance is measured by an objective standard of competence under prevailing professional norms. Further, in order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Evans*, 186 Ill. 2d 83, 93, 237 Ill. Dec. 118, 708 N.E.2d 1158 (1999); *People v. Griffin*, 178 Ill. 2d 65, 73-74, 227 Ill. Dec. 338, 687 N.E.2d 820 (1997). Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432, 241 Ill. Dec. 535, 719 N.E.2d 664 (1999).

In order to establish prejudice, a defendant must prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698, 104 S. Ct. at 2068. A reasonable probability is defined as a probability that is sufficient to undermine confidence in the outcome. Thus, the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Evans*, 186 Ill. 2d at 93; Griffin, 178 Ill. 2d at 74. A defendant must satisfy both prongs of the *Strickland* test. *People v. Mahaffey*, 194 Ill. 2d 154, 2000 Ill., 252 Ill. Dec. 1, 742 N.E.2d 251 (2000). If a defendant cannot establish that he suffered prejudice, a court need not determine whether counsel's performance was constitutionally deficient. *Griffin*, 178 Ill. 2d at 74.

A. Pretrial Errors

Defendant maintains that his counsel was ineffective in presenting his motion to suppress a statement that defendant gave at police headquarters on the night of March 17, 1987, in which he confessed to the murder of Lisa Ferguson.

Defendant contends that his counsel failed to introduce corroborating testimony relating to the claim that his confession was coerced. Prior to trial, defense counsel moved to suppress defendant's statement, arguing that it was coerced. In support of this motion, defense counsel offered testimony from Josephine Palomino, defendant's girlfriend. She stated:

> "I heard David Smith [at the police station]. He was yelling, screaming. He was swearing, telling the police officers-well, I would take it for granted it was the police officers-to leave him alone, not to touch him, to get away from him, and he was calling for me. I want to talk to Josie. I want to talk to Josie. I want to see Josie."

In denying the motion, the trial judge stated:

> "There is absolutely no evidence indicating that there was any physical abuse in this case, and I think that the pictures [of defendant] bear this out, that there was no physical abuse seen in those photographs. *** Assuming arguendo that there were loud voices raised *** the Petitioner does not by this type of testimony meet his burden indicating that *** the statement was not freely and voluntarily given.

Where a defendant has made a statement and later has had an opportunity to reflect on that statement and consult with his advisors, be they attorneys or other people he comes into contact with, he shortly realizes that his mere denial is not going to be enough. He must show something else.

Well, I don't think that there is any evidence in this case that the statement was other than free and voluntary."

Defendant now argues that the trial judge's decision would have been different had defense counsel offered additional evidence from Rose Palomino, Josephine Palomino's mother. At trial, Rose Palomino testified: "I heard [defendant] yelling for Josie, calling her name, let me see Josie, let me see Josie, and he said, get your 'F'ing hands off of me."

This argument is waived. Rose Palomino's testimony was part of the record on direct appeal. Accordingly, this claim could have been raised at that time. See *Towns, 182 Ill. 2d at 502-03* (issues that could have been presented on direct appeal but were not, are waived). However, defendant contends that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *West*, 187 Ill. 2d at 435. "A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that the decision prejudiced the defendant. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal. *People v. Childress*, 191 Ill. 2d 168, 175, 246 Ill. Dec. 352, 730 N.E.2d 32 (2000); *People v. West*, 187 Ill. 2d 418, 435, 241 Ill. Dec. 535, 719 N.E.2d 664 (1999) (and cases cited therein)." *People v. Easley*, 192 Ill. 2d 307, 328-29, 249 Ill. Dec. 537, 736 N.E.2d 975 (2000).

In examining the claim on the merits, however, we find that defendant's argument fails. The trial judge was clear in

his finding that, even assuming that there were "loud voices raised," such evidence did not satisfy defendant's burden of proof to show that his statement was not freely and voluntarily given. Rose Palomino's testimony does not significantly differ from Josephine Palomino's testimony and is merely cumulative. Thus, based on the trial judge's statements, we do not believe that this additional testimony by Rose Palomino would have convinced the trial judge that defendant met his burden in showing that his statement was not voluntary. There was no reasonable probability that the outcome of defendant's motion to suppress would have been different. Defendant has therefore failed to establish that he suffered prejudice as required by *Strickland*, and his ineffective assistance of counsel claim fails.

With regard to the same suppression hearing, defendant next argues that his trial counsel was ineffective for failing to present testimony that defendant was under the influence of phencyclidine (PCP) at the time he gave his statement, and that counsel failed to present expert testimony relating to the effects of PCP. To support the argument that he was, in fact, under the influence of PCP when he made his statement at the police station, defendant attaches the affidavits of two friends who were with defendant on the day of the murder, Efren Ramirez and Manuel Ramirez. In addition, defendant attaches an affidavit from Dr. Bruce Perry discussing how use of PCP could have affected defendant's ability to make a free and voluntary statement.

The affidavits on which defendant relies to support the argument that he was under the influence of PCP are insufficient to make a substantial showing that his right to effective assistance of counsel has been violated. In these affidavits, defendant's friends stated that, on the day of the murder, they drank alcohol and smoked marijuana with defendant. Manuel Ramirez stated that "Eddie had mentioned" that PCP was present in the marijuana. Edward Ramirez stated that "there was PCP in the pot, you could taste

it. I can tell the difference blindfolded." Thus, evidence of defendant's alleged PCP inhalation boils down to Edward Ramirez's contention that defendant inhaled PCP because Edward "can tell the difference [between marijuana and PCP] blindfolded." We reject defendant's claim that these affidavits "clearly prove" that defendant had ingested PCP at the time of the murder. To the contrary, we find that the statement that Edward Ramirez "can tell the difference blindfolded" is speculative and insufficient to establish that defendant was under the influence of PCP. Thus, even if defendant's counsel would have presented the testimony of these two friends of defendant, we do not believe the result of suppression hearing would have differed. Defendant has not established that he suffered prejudice from his counsel's failure to present the testimony of Efren Ramirez and Manuel Ramirez. Therefore, defendant did not receive ineffective assistance of counsel.

Defendant next claims that his counsel was ineffective for failing to present any evidence in support of a motion counsel filed to suppress additional statements made by defendant at his apartment. At the suppression hearing on this motion, Officer Daniel Simon and Detectives John McCann and John Koclanis testified that, after leaving the crime scene on March 17, 1987, they proceeded to defendant's apartment as part of their homicide investigation. When they arrived at defendant's building, Officer Simon and his partner walked through a gangway and heard an argument between a woman, later identified as Josephine Palomino, and a man, later identified as defendant. They went through a door at the rear of the building which led into a vestibule area. At that time, the officers heard the following conversation:

"Female: 'Where have you been tonight?'

Male: 'I have been out.'

Female: 'Where have you been tonight?'

Male: 'I saw someone get killed tonight.'

Female: 'Your clothes are all full of blood, are all full of blood. You had something to do with it.'

Male: 'I did it.'"

On defendant's first direct appeal, he argued that these statements should have been suppressed because the officers violated the fourth amendment to the United States Constitution and article I, section 6, of the Illinois Constitution when they listened to this conversation outside of defendant's apartment door. We held that no fourth amendment "search" occurred because defendant did not have a reasonable expectation of privacy in his conversation. *Smith*, 152 Ill. 2d at 245. We found that: (1) the area where the officers overhead the conversation was a common area; (2) the area where the officers where standing when they overhead the conversation was unlocked; (3) defendant's voice was raised; and (4) the officers used no artificial means to enhance their ability to hear, nor did they enter an area where they had no legal right to be. *Smith*, 152 Ill. 2d at 245-46.

Defendant now claims that his counsel should have introduced testimony from Josephine Palomino at the suppression hearing. In support of this claim, defendant has attached an affidavit from Josephine Palomino to his post-conviction petition, in which she states that defendant never said "I did it." Palomino also states that the apartment door was "always locked." Defendant now argues that had this testimony been introduced at the suppression hearing, the statement made at the apartment would have been suppressed.

We find that, even if defendant's statement "I did it" was suppressed, there is no reasonable probability that the

outcome of defendant's trial would have been different. Defendant made another statement at the police station confessing to the murder of Lisa Ferguson which included more detail than the mere statement "I did it." That statement was written by an assistant State's Attorney, signed by defendant and introduced at trial. As we noted in our opinion on defendant's direct appeal, the evidence against defendant was overwhelming. *See Smith*, 152 Ill. 2d at 269. In light of the fact that this was not a closely balanced case, we conclude that there is no reasonable probability that the outcome of defendant's trial would have been different had the challenged statement never been admitted. Therefore, we find that defendant suffered no prejudice as a result of the claimed error. *Mahaffey*, slip op. at 19.

B. Trial Errors

a. *Intoxication Defense*

Defendant next contends that his trial counsel failed to adequately investigate and present evidence that would have supported an intoxication defense at trial. Defendant claims that had trial counsel presented testimony as to defendant's drugged and intoxicated condition on the night of the murder, he would have had a basis for an affirmative defense of voluntary intoxication or a jury instruction on involuntary manslaughter. According to defendant, "testimony regarding [defendant's] drug and alcohol ingestion would have established the defense of voluntary intoxication and would have reduced [defendant's] legal culpability for the alleged crime."

In support of this argument, defendant offers the affidavits of Efren Ramirez and Manuel Ramirez, as well as an affidavit from Edward Ramirez. As we have discussed previously in this opinion, the affidavits of Edward and Manuel Ramirez

are insufficient to establish that defendant was under the influence of PCP at the time of the murder. Moreover, while Edward Ramirez's affidavit states that he and defendant smoked marijuana on the day of the murder, it does not mention anything about PCP. Thus, we do not agree with defendant's claim that the evidence contained in these three affidavits "establish" that defendant was under the influence of marijuana and PCP. Rather, we find that the evidence that defendant was under the influence of PCP is speculative and inconclusive.

Moreover, even if defendant had conclusively established that he had taken PCP on the day of the murder, the evidence would have been insufficient to support an affirmative defense of voluntary intoxication. In *People v. Jackson*, 145 Ill. 2d 43, 163 Ill. Dec. 859, 582 N.E.2d 125 (1991), *vacated on other grounds*, 506 U.S. 802, 121 L. Ed. 2d 5, 113 S. Ct. 32 (1992), the defendant claimed that he used cocaine and heroin on the night that he committed several murders, and that he used PCP, marijuana and heroin the following day. *Jackson*, 145 Ill. 2d at 71. A defense expert testified to the effects of the drugs. On appeal, this court held that it did not believe that any rational jury would have found the defendant's attempt to raise an intoxication defense credible. *Jackson*, 145 Ill. 2d at 86. We found that the defendant was presumed to intend the natural and probable consequence of his acts and that such a presumption was supported by the defendant's written and oral statements in which he stated his intent to kill the victim. *Jackson*, 145 Ill. 2d at 87. We also noted that the detail of defendant's recall in his statements to the police showed that he was acutely aware of his surroundings. Finally, we found that those who observed defendant on the night of the crimes stated that he appeared to have no difficulty speaking or walking. Thus, we held that the jury would not have believed that the defendant was not capable of acting intentionally. *Jackson*, 145 Ill. 2d at 87.

Similarly, in this case, even if the jury believed that defendant had used PCP on the day of the murder, we cannot conclude that the jury would have found that defendant did not intend to cause the death of the victim. In his statement to the police, defendant stated that he initially went to the apartment where the victim was staying to steal a VCR. When he learned that the victim was home, he left. Defendant stated that he then "walked around for a while *** then decided to go back to the apartment," and that "he didn't know why he went back up to the apartment except that he must have intended to kill [the victim]." Defendant was able to recall the events of the murder when giving his statement.

Further, those who were with defendant on the night of the murder stated that he did not appear overly intoxicated. Max Ferguson, the victim's brother, testified that he saw defendant at Bucko's tavern on the evening of the murder and he did not see him slurring his speech, swaggering or stumbling, but that he only noticed that defendant was "being loud." Carlos Moya testified that on the evening of the murder, although defendant appeared to be "under the influence" of alcohol because his words were not completely clear, he did not appear to be intoxicated. Juanita Soto testified that defendant was at a bar before the murder and that defendant was "feeling good," "somewhat intoxicated," and that "you could say" that he was slurring his words, but that he was not stumbling or swaying. Officer Simon, one of the patrol officers who assisted in the homicide investigation, testified that around 10 p.m. on the night of the murder, defendant did not appear intoxicated, but rather "seemed normal in every respect. There was no slurred speech, no bloodshot eyes *** no staggering or stumbling" and no smell of alcohol. Officer Simon stated that defendant did not appear to be under the influence of any drugs. Finally, the assistant State's Attorney who took and drafted defendant's statement on the night of the murder wrote that defendant appeared to be free from the effects of alcohol and drugs and testified that, while he did

not specifically ask defendant, "there was no overt notice" that defendant was under the influence.

Defendant relies on *People v. Wright*, 111 Ill. 2d 18, 94 Ill. Dec. 726, 488 N.E.2d 973 (1986). *Wright*, however, is inapposite to the case at bar. In *Wright*, evidence existed to show that the defendant was not guilty of murder, of which she was convicted, but rather of involuntary manslaughter due to her intoxication at the time that she shot and killed her daughter. *Wright*, 111 Ill. 2d at 29. At the evidentiary hearing on defendant's petition for post-conviction relief, defendant's attorney testified that he did not raise the defense of intoxication because he thought that "the defense of drunkenness *** is that you have to be drunk to the extent that you have no recall of the facts." We found that this was a misapprehension of the law and was not the result of trial tactics or strategy. *Wright*, 111 Ill. 2d at 27. Moreover, at the evidentiary hearing on defendant's post-conviction petition, the trial judge stated that " 'the outcome would have been different, and I can say with a certainty because I heard the case, the outcome would have been different had I heard the evidence that I heard today. I would have rendered a judgment of guilty of involuntary manslaughter.' " *Wright*, 111 Ill. 2d at 31. We determined that this was a "classic demonstration" that, but for counsel's deficient performance, the result of the trial would have been different. *Wright*, 111 Ill. 2d at 31.

Unlike *Wright*, nothing in the case at bar suggests that defendant's counsel misunderstood the law regarding voluntary intoxication. There was simply not enough evidence to support a defense of voluntary intoxication. Any evidence with regard to defendant's intoxication is speculative and inconclusive. In fact, the majority of the evidence tends to show that defendant was not intoxicated when he committed the murder. Therefore, we do not find *Wright* to be pertinent to the case at bar.

In light of all of the evidence, we believe that, as in *Jackson*, evidence of defendant's intent is apparent. Defendant has not established that he suffered prejudice from his counsel's failure to present evidence in support of a voluntary intoxication defense, as required by *Strickland*. Even if defendant's counsel had offered the evidence that defendant seeks, we cannot conclude that there is a reasonable probability that the result of the proceeding would have been different.

b. *Insanity Defense*

In a related argument, defendant claims that counsel was ineffective for failing to present an insanity defense. In support of this contention, defendant attaches an affidavit from Dr. Bruce Perry, a psychiatrist with a degree in neuropharmacology, which states that, in his opinion, defendant "was intoxicated with drugs (especially PCP); he was responding to internal processes without adequate ties to reality. In essence he was operating under a condition of extreme mental disturbance," and that his judgment was "severely impaired" at the time of the murder. Defendant argues that this affidavit, in combination with the evidence that defense counsel presented at the resentencing hearing, supports the contention that his counsel should have requested a bifurcated trial and presented an insanity defense along with the defense theory presented at trial.

At defendant's resentencing hearing, Dr. George Savarese, a licensed clinical social worker who completed a comprehensive psycho-social developmental history of defendant, testified that, based on two interviews with defendant and review of interviews with his family and friends, he concluded that defendant had a "borderline personality disorder." Savarese further testified that it was "very feasible that [defendant] could have slipped into a

transient psychotic state" during the murder. In describing what a "transient psychotic state" is, Savarese stated:

> "an individual can decomponsate into a psychotic state *** they're on a continuum from obviously normal to actually insane, and most individuals fall somewhere in the middle probably *** although borderline is not psychotic, particularly in and of itself, [an individual with borderline personality disorder] can slip into a psychotic state where they're completed detached at least for a limited amount of time from reality."

This evidence does not constitute a substantial insanity defense. The Criminal Code of 1961 states that "[a] person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 1998). Though the State must prove beyond a reasonable doubt each element of the offense charged, "the burden of proof is on the defendant to prove by clear and convincing evidence that the defendant is not guilty by reason of insanity." 720 ILCS 5/6-2(e) (West 1998).

In *People v. Wilson*, 191 Ill. 2d 363, 247 Ill. Dec. 443, 732 N.E.2d 498 (2000), the defendant claimed that his counsel was ineffective for failing to investigate and present an insanity defense. Evidence suggested that defendant suffered from epilepsy, was probably mildly retarded and may have been suffering form an extreme mental or emotional disturbance at the time of the murder. We held that the sum of this evidence would not have placed a reasonable attorney on notice that an insanity defense was viable because "nothing in defendant's records provides any indication that his mental problems would meet the definition of legal insanity." *Wilson*, 191 Ill. 2d at 372.

As in *Wilson*, we find that defendant's "borderline personality disorder" does not rise to the level of insanity. In

order to enter the apartment where the victim was staying, defendant pretended to be the victim's brother. After committing the murder, defendant went to his apartment and tried to wash the blood out of his clothes. Clearly, this is a person who appreciated the criminality of his conduct. Therefore, we find that defendant's counsel was not ineffective for failing to present an insanity defense.

c. *Prosecution Closing Argument*

Next, defendant contends that his trial counsel was ineffective for failing to object to a portion of the State's closing argument during defendant's trial. Though this argument is waived due to defendant's failure to raise it on direct appeal, defendant avoids the waiver rule by arguing that his appellate counsel was ineffective for raising the issue on appeal. *See People v. Whitehead*, 169 Ill. 2d 355, 371-72, 215 Ill. Dec. 164, 662 N.E.2d 1304 (1996).

After the murder, the victim was found lying face down on the kitchen floor of the apartment where she was staying. Her shirt was pulled above her waist and her pants and underwear were pulled away from her body and caught around her right ankle. The victim's naked buttocks were lying on a curling iron.

During closing argument, the prosecution stated:

> "Counsel makes a big tado [*sic*] about why the curling iron was not uncovered. Well, ladies and gentlemen, I submit to you in their wildest dreams after all their years of experience, would [*sic*] never have thought this curling iron could have been used in such a horrible fashion as this Defendant used it. So that perhaps using hindsight, the curling iron has become

more important than it was then, but you can insure [*sic*], ladies and gentleman, this is not an ordinary situation, this is not an ordinary way to use a curling iron."

Defendant argues that because the State presented no evidence that "conclusively established" that defendant forcibly penetrated the victim's anus with a curling iron, the argument was improper.

A prosecutor is given great latitude in making closing arguments. *People v. Blue*, 189 Ill. 2d 99, 127-28, 244 Ill. Dec. 32, 724 N.E.2d 920 (2000). A prosecutor may comment on the evidence and all reasonable inferences stemming from the evidence. *Blue*, 189 Ill. 2d at 127. An argument that serves no purpose other than to inflame the jury, however, is error. *Blue*, 189 Ill. 2d at 128.

At trial, Dr. Nancy Jones, a forensic pathologist who examined the victim's body after her death testified: "A laceration is a tear of the skin caused by separation and pulling. These were located around the circumference of [the victim's] anus. While checking the anus, I noticed [*201] that it was gaping; that there was some bloody fluid within the opening and also that there was a tear or laceration inside the anus in the mucosa or the lining surface of the rectum." Jones also testified that the victim's injuries would be consistent with a forced entry of the anus by an object such as a curling iron, an object of the same shape or size as a curling iron, or a penis.

In addition, the State introduced several pictures of the victim. In those pictures, the victim is lying face down on the floor, with her shirt pulled above her waste, her jeans and underwear pulled away from her body and caught around her right ankle, and her lower torso and buttocks lying on a curling iron. Officer Sharon Gaynor, one of the first police officers to arrive at the scene, testified that she found the victim in that manner.

From the record, the statements made by the prosecutor during closing argument were a reasonable inference from the evidence. Jones testified that the victim's injuries were consistent with forced entry of the victim's anus by a curling iron. Further, photographs published to the jury showed the victim's lower torso and buttocks lying on a curling iron.

Defendant's reliance on *People v. Linscott*, 142 Ill. 2d 22, 153 Ill. Dec. 249, 566 N.E.2d 1355 (1991), and *People v. McCollum*, 239 Ill. App. 3d 593, 180 Ill. Dec. 346, 607 N.E.2d 240 (1992), is misplaced. In *Linscott*, the State introduced evidence that the defendant's hairs were consistent with hairs found at the scene of the crime. The State's witness stated that one could not determine from whose head the hair found at the crime scene came, but only that the hair was consistent with the defendant's hair. In total, three witnesses testified that they could not conclusively identify the hairs as coming from the defendant. In closing argument, however, the prosecutor argued repeatedly that the defendant's hair was found in the victim's apartment and on her body. This court held that, because there was no evidence to support these statements, the prosecution's argument was improper.

In *People v. McCollum*, 239 Ill. App. 3d 593, 180 Ill. Dec. 346, 607 N.E.2d 240 (1992), the prosecutor clearly misstated the evidence adduced at trial. The prosecutor stated in closing argument that there was a "definite match" between tire marks found near the scene of the crime and the tires belonging to the defendant's car. The testimony at trial did not establish that the tire prints "matched," but only that they resembled each other. *McCollum*, 239 Ill. App. 3d at 599. Moreover, the prosecutor stated that blood found on a glove in the defendant's car belonged to the victim. The testimony at trial, however, did not establish that the blood came from the victim, but rather that the blood could have come from the victim or 40% of the general population. The prosecutor also improperly appealed to the passions of the jurors and argued the defendant's convictions to show propensity, when those

convictions were introduced at trial for the limited purpose of impeachment. *McCollum*, 239 Ill. App. 3d at 600. The court noted that, when viewed separately, the comments would not constitute reversible error. *McCollum*, 239 Ill. App. 3d at 597. However, the court found that the totality of the improper comments did constitute reversible error. *McCollum*, 239 Ill. App. 3d at 597.

Unlike the situations in *Linscott* and *McCollum*, the prosecutor in the case at bar did not misstate the evidence. The prosecutor argued reasonable inferences that were supported by the evidence adduced at trial. Therefore, defendant's appellate counsel was not ineffective for failing to raise this argument on appeal.

C. Sentencing Errors

With regard to sentencing, defendant first contends that his trial counsel was ineffective for failing to investigate and present mitigation testimony at his resentencing hearing. Initially, defendant contends that his counsel failed to investigate and present evidence that defendant was under the influence of PCP on the day of the murder and evidence relating to the effects of PCP. In support of the argument that he was under the influence of PCP at the time of the murder, defendant again offers the affidavits of the three friends who were with defendant on the day of the murder, Manuel Ramirez, Efren Ramirez and Edward Ramirez.

We initially note that defendant's claim that trial counsel "did not even speak to any of the individuals that [defendant] was with that day" is not entirely correct. Manual Ramirez states in his affidavit that he spoke with investigators working for defense counsel. Efren and Edward Ramirez do not state whether or not they spoke with defense counsel or his team.

Therefore, we cannot assume that defense counsel failed to interview these witnesses.

Further, as we have concluded, the affidavits from defendant's friends regarding his alleged use of PCP is speculative and insufficient to establish that defendant was under the influence of PCP. George Savarese testified at defendant's resentencing hearing that defendant's friend Efren Ramirez mentioned that defendant had smoked marijuana that was laced with PCP on the day of the murder. Thus, in addition to being speculative, the evidence that defendant claims was lacking is cumulative. Accordingly, we find that, even if the judge had heard the additional evidence from defendant's friends, there is no reasonable probability that the result of defendant's sentencing would have been different. *See, e.g., People v. Mitchell*, 189 Ill. 2d 312, 354-55, 245 Ill. Dec. 1, 727 N.E.2d 254 (2000); *People v. Sanchez*, 169 Ill. 2d 472, 490-91, 215 Ill. Dec. 59, 662 N.E.2d 1199 (1996). Defendant cannot establish that he suffered prejudice as a result of counsel's failure to present additional evidence of defendant's PCP use on the day of the murder, and, as a result, his ineffective assistance of counsel claim fails. Thus, defendant has failed to establish that his defense counsel was ineffective for failing to present evidence as to the effects of PCP.

Defendant also claims that his trial counsel was ineffective for failing "to present a complete picture of David Smith's tumultuous upbringing" at defendant's resentencing hearing. Specifically, defendant claims that counsel should have presented evidence that: (1) defendant's father disciplined him by whipping him; (2) defendant was physically and verbally abused by his stepmother; (3) at the age of 10, defendant engaged in a sexual relationship with his 18-year-old baby-sitter; (4) defendant was forced to take baths with his siblings as an adolescent; (5) when defendant was sent to a detention center, he did not want to return home; and (6) defendant's brother introduced him to drugs, including PCP,

when defendant was 15 years of age. Defendant points to new affidavits from his sister, his father and the mother of his son that establish these facts.

We disagree with defendant's contention that his trial counsel failed to present a complete picture of defendant's upbringing. At defendant's resentencing hearing, his counsel and the State stipulated to the testimony of defendant's brother, James Smith, which was given at defendant's first sentencing hearing. James Smith testified that their stepmother did not love them like she loved her own children, that "the punishments were a little different," that she struck all the children, including defendant, and that she hit them with a broom handle. Moreover, he testified that defendant liked the juvenile detention center where he was sent more than his home. With regard to defendant's drug use, James Smith testified that defendant drank, smoked marijuana and took "acid" beginning in late junior high school or early high school and that he was personally aware of defendant's use of PCP from 17 years of age on. Defendant's mother also testified to his marijuana and acid use.

During defendant's resentencing hearing, Savarese testified to a comprehensive psycho-social developmental history of the defendant which he completed. To complete that evaluation, Savarese reviewed interviews with defendant's mother, father, half-brother and sister. He testified that, according to defendant's siblings, defendant's father was "very abusive" and that "there was physical abuse."

Savarese also testified that defendant's father admitted that he beat defendant with a belt on his back and legs, and that defendant's sister stated that their stepmother would hit defendant with a board, one time even breaking it on him. He also testified that defendant's sister stated that "we had to take baths in pairs up until the time that I was 15 years old." Finally, Savarese testified about defendant's drug use, stating that defendant "had been experimenting early on with drugs in the beginning around 11 or 12 years old, and that he had

used a variety of substance, anything from LSD, PCP, marijuana, cocaine, alcohol, heroin, acid, hallucinogenic mushrooms."

The evidence offered at defendant's resentencing hearing establishes that defense counsel presented a complete picture of defendant's upbringing. The information that defendant claims was lacking was presented through the testimony of his brother and Savarese. Any additional testimony regarding defendant's childhood would have been cumulative. There is no reasonable probability that introduction of this cumulative evidence would have altered the result of defendant's resentencing hearing. *See, e.g., Mitchell*, 189 Ill. 2d at 354-55; *Sanchez*, 169 Ill. 2d at 490-91. Thus, defendant's claim that he received ineffective assistance of counsel fails.

Defendant next claims ineffective assistance of counsel for his trial counsel's failure to investigate and present witnesses to rebut aggravating evidence of defendant's conduct while incarcerated. Defendant argues that two employees of the Illinois Department of Corrections, Charles Margherio and Robert Ellinger, should have been called to testify to defendant's positive behavior in prison. Specifically, defendant presents affidavits from those two employees which state that: (1) defendant exhibited good behavior, was polite, did not cause problems, and showed respect for authority; (2) Margherio never wrote defendant a disciplinary ticket; and (3) Margherio believed that defendant could adjust well to incarceration and would not be a danger to other inmates.

At defendant's resentencing hearing, his counsel and the State stipulated to the testimony of Timothy Martin, a jail supervisor who testified at defendant's first sentencing hearing. Martin testified that defendant was a volunteer worker in the prison, that his work was satisfactory, that he got along with the other volunteer workers, that he was polite, courteous, helpful, and cooperative, and that he was not involved in a gang, but rather associated with other inmates

who stayed out of trouble. Martin also stated that he never wrote defendant a disciplinary ticket, that defendant became a Christian while in prison, that he attended Bible studies and "witnessed" his faith to other inmates, and that he kept himself and his area neat. Finally, Martin testified that, in his opinion, defendant would be able to succeed in an institutionalized setting.

Again, we find that the evidence defendant claims was lacking is cumulative. Martin testified to everything that Charles Margherio and Robert Ellinger stated in their affidavits. In fact, Martin testified to much more than defendant's cooperation and good behavior. He presented evidence on defendant's new commitment to Christianity while incarcerated and his lack of gang activity. We find that, due to the cumulative nature of this evidence, there is no reasonable probability that the outcome of defendant's proceeding would have been different had his counsel introduced it. Therefore, defendant's counsel was not ineffective for failing to present this additional evidence.

Defendant relies on *People v. Orange*, 168 Ill. 2d 138, 213 Ill. Dec. 589, 659 N.E.2d 935 (1995), and *People v. Thompkins*, 161 Ill. 2d 148, 204 Ill. Dec. 147, 641 N.E.2d 371 (1994), to support his claim that he should have received an evidentiary hearing due to his counsel's failure to introduce mitigating evidence. In *Orange*, defense counsel presented no witnesses in mitigation. *Orange*, 168 Ill. 2d at 166. Such is not the case here. Defendant's counsel here offered a significant amount of evidence in mitigation on defendant's behalf.

Moreover, in *People v. Thompkins*, 161 Ill. 2d 148, 204 Ill. Dec. 147, 641 N.E.2d 371 (1994), defense counsel presented only one [**1211] witness at the defendant's sentencing hearing-the defendant's wife. Counsel in that case submitted numerous letters in support of the defendant, but those letters came from [***38] people who did not appear to know the defendant well. Significantly, in that case, the defendant

submitted a number of affidavits of his family and friends who stated that they were not contacted by defense counsel prior to the sentencing hearing. *Thompkins*, 161 Ill. 2d at 166. Here, as noted, defendant's counsel presented several witnesses on defendant's behalf at the resentencing hearing. Savarese, who testified on defendant's behalf, spoke with almost all of the potential witnesses that defendant claims could have provided mitigating evidence and offered testimony about those interviews. The evidence that defendant claims was absent fails to provide any substantial additional mitigation evidence. Rather, as indicated, much of the information in the affidavits is cumulative.

We cannot agree with defendant's contention that but for his counsel's failure to present evidence of other mitigating factors, defendant would not have been sentenced to death. In aggravation, the trial court heard, *inter alia*, that defendant stated that he was "glad" that the victim had died because he "didn't want her to live remembering how bad he had beaten her." Moreover, the court heard evidence that the victim suffered at least 29 blunt trauma injuries, three stab wounds, two incised wounds, numerous bruises, abrasions and hemorrhages, and anal injuries which were consistent with forcible penetration of her anus. In sentencing defendant to death, the trial judge stated that he believed this case to be "exceptionally brutal" and he could not remember a case where the facts were more aggravated. We find that the evidence defendant complains was lacking would have had minimal impact in defendant's sentencing hearing. Thus, even taking all of the affidavits as true, we believe that the trial court properly denied defendant an evidentiary hearing. Defendant has failed to make a substantial showing that his constitutional rights were violated. *People v. Hobley*, 182 Ill. 2d 404, 428, 231 Ill. Dec. 321, 696 N.E.2d 313 (1998).

III. Constitutionality of the Illinois Death Penalty Statute

Defendant makes several arguments challenging the constitutionality of the Illinois death penalty statute. The circuit court held that these claims were waived; however, defendant argues that his appellate counsel was ineffective for his failure to raise these issues on direct appeal. This court has previously rejected the arguments that the Illinois death penalty statute is unconstitutional because: it fails to limit the nonstatutory aggravating factors which may be considered by the sentencing authority (*see, e.g., People v. Williams*, 193 Ill. 2d 306, 2000 Ill., 250 Ill. Dec. 692, 739 N.E.2d 455 (2000); it fails to require written findings with regard to nonstatutory aggravating factors (*see, e.g., People v. Cloutier*, 178 Ill. 2d 141, 173-74, 227 Ill. Dec. 448, 687 N.E.2d 930 (1997)); it places a judicial function in the prosecutor (see, *e.g., Williams*, 2000 Il.); and it shifts to the defendant the burden of proving that a sentence other than death is appropriate (*see, e.g., Williams*, 2000 Ill.). Defendant offers no new or compelling reasons for reconsideration of these decisions. Therefore, defendant's counsel was not ineffective for failing to raise these issues.

CONCLUSION

For the reasons stated, we affirm the judgment of the circuit court dismissing defendant's amended post-conviction petition without an evidentiary hearing. We direct the clerk of this court to enter an order setting Wednesday, March 28, 2001, as the date on which the sentence of death entered by

the circuit court of Cook County shall be carried out. Defendant shall be executed in the manner provided by law. *725 ILCS 5/119-5* (West 1996). The clerk of this court shall send a certified copy of the mandate in this case to the Director of Corrections, to the warden of Tamms Correctional Center, and to the warden of the institution where defendant is now confined.

Affirmed.

DISSENT BY:
HARRISON (In Part)

DISSENT

CHIEF JUSTICE HARRISON, concurring in part and dissenting in part:

I agree that Smith's convictions should not be disturbed. In my view, however, his sentence of death cannot be allowed to stand. For the reasons set forth in my partial concurrence and partial dissent in *People v. Bull*, 185 Ill. 2d 179, 235 Ill. Dec. 641, 705 N.E.2d 824 (1998), the Illinois death penalty law violates the eighth and fourteenth amendments to the United States Constitution (U.S. CONST., amends. VIII, XIV) and article I, section 2, of the Illinois Constitution (Ill. CONST. 1970, art. I, § 2). Smith's sentence of death should therefore be vacated and he should be sentenced to a term of imprisonment. 720 ILCS 5/9-1(j) (West 1998).

APPENDIX E

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701
April 2, 2001

No. 86775

Ms. Ilene Lin Bloom
Winston & Strawn
35 West Wacker Drive
Chicago, IL 60601

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

DAVID SMITH,
Appellant.

Appeal, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 12, 2001.

Fitzgerald, Kilbride and Garman, JJ., took no part.

APPENDIX F

IN THE SUPREME COURT OF ILLINOIS

[Filed Apr. 17, 2001]

---

87 CR 5052

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

DAVID SMITH,
Appellant.

Hon. Themis Karnezis, Judge Presiding

ORDER

This matter has come for consideration upon the motion of appellant David Smith to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for certiorari or the expiration of the period within which said application or notice may be filed. If certiorari is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or certiorari may be sought.

/s/ _____
Justice

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ILLINOIS DEATH PENALTY STATUTE

CRIMINAL CODE OF 1961; CHAPTER 720—CRIMINAL OFFENSES; TITLE III—SPECIFIC OFFENSES; PART B—OFFENSES DIRECTED AGAINST THE PERSON; ARTICLE 9—HOMICIDE

§ 720 ILCS 5/9-1. First degree Murder—Death penalties —Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals

Sec. 9-1. First degree Murder—Death penalties—Exceptions—Separate Hearings—Proof—Findings—Appellate procedures—Reversals. (a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) he is attempting or committing a forcible felony other than second degree murder.

(b) Aggravating Factors. A defendant who at the time of the commission of the offense has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if:

(1) the murdered individual was a peace officer or fireman killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, and the defendant knew or should have known that the murdered individual was a peace officer or fireman; or

(2) the murdered individual was an employee of an institution or facility of the Department of Corrections, or any

similar local correctional agency, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation for performing his official duties, or the murdered individual was an inmate at such institution or facility and was killed on the grounds thereof, or the murdered individual was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or

(3) the defendant has been convicted of murdering two or more individuals under subsection (a) of this Section or under any law of the United States or of any state which is substantially similar to subsection (a) of this Section regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts so long as the deaths were the result of either an intent to kill more than one person or of separate acts which the defendant knew would cause death or create a strong probability of death or great bodily harm to the murdered individual or another; or

(4) the murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

(5) the defendant committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder or procured another to commit the murder for money or anything of value; or

(6) the murdered individual was killed in the course of another felony if:

(a) the murdered individual:

(i) was actually killed by the defendant, or

(ii) received physical injuries personally inflicted by the defendant substantially contemporaneously with physical injuries caused by one or more persons for whose conduct the

defendant is legally accountable under Section 5-2 of this Code [720 ILCS 5/5-2], and the physical injuries inflicted by either the defendant or the other person or persons for whose conduct he is legally accountable caused the death of the murdered individual; and

(b) in performing the acts which caused the death of the murdered individual or which resulted in physical injuries personally inflicted by the defendant on the murdered individual under the circumstances of subdivision (ii) of subparagraph (a) of paragraph (6) of subsection (b) of this Section, the defendant acted with the intent to kill the murdered individual or with the knowledge that his acts created a strong probability of death or great bodily harm to the murdered individual or another; and

(c) the other felony was one of the following: armed robbery, armed violence, robbery, predatory criminal sexual assault of a child, aggravated criminal sexual assault, aggravated kidnapping, aggravated vehicular hijacking, forcible detention, arson, aggravated arson, aggravated stalking, burglary, residential burglary, home invasion, calculated criminal drug conspiracy as defined in Section 405 of the Illinois Controlled Substances Act [720 ILCS 570/405], streetgang criminal drug conspiracy as defined in Section 405.2 of the Illinois Controlled Substances Act [720 ILCS 570/405.2], or the attempt to commit any of the felonies listed in this subsection (c); or

(7) the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

(8) the defendant committed the murder with intent to prevent the murdered individual from testifying in any criminal prosecution or giving material assistance to the State in any investigation or prosecution, either against the defendant or another; or the defendant committed the murder

because the murdered individual was a witness in any prosecution or gave material assistance to the State in any investigation or prosecution, either against the defendant or another; or

(9) the defendant, while committing an offense punishable under Sections 401, 401.1, 401.2, 405, 405.2, 407 or 407.1 or subsection (b) of Section 404 of the Illinois Controlled Substances Act [720 ILCS 570/401, 720 ILCS 570/401.1, 720 ILCS 570/401.2, 720 ILCS 570/405, 720 ILCS 570/405.2, 720 ILCS 570/407 or 720 ILCS 570/407.1 or 720 ILCS 570/404], or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

(10) the defendant was incarcerated in an institution or facility of the Department of Corrections at the time of the murder, and while committing an offense punishable as a felony under Illinois law, or while engaged in a conspiracy or solicitation to commit such offense, intentionally killed an individual or counseled, commanded, induced, procured or caused the intentional killing of the murdered individual; or

(11) the murder was committed in a cold, calculated and premeditated manner pursuant to a preconceived plan, scheme or design to take a human life by unlawful means, and the conduct of the defendant created a reasonable expectation that the death of a human being would result therefrom; or

(12) the murdered individual was an emergency medical technician—ambulance, emergency medical technician—intermediate, emergency medical technician—paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit, killed in the course of performing his official duties, to prevent the performance of his official duties, or in retaliation

for performing his official duties, and the defendant knew or should have known that the murdered individual was an emergency medical technician—ambulance, emergency medical technician—intermediate, emergency medical technician—paramedic, ambulance driver, or other medical assistance or first aid personnel; or

(13) the defendant was a principal administrator, organizer, or leader of a calculated criminal drug conspiracy consisting of a hierarchical position of authority superior to that of all other members of the conspiracy, and the defendant counseled, commanded, induced, procured, or caused the intentional killing of the murdered person; or

(14) the murder was intentional and involved the infliction of torture. For the purpose of this Section torture means the infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering or agony of the victim; or

(15) the murder was committed as a result of the intentional discharge of a firearm by the defendant from a motor vehicle and the victim was not present within the motor vehicle; or

(16) the murdered individual was 60 years of age or older and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty; or

(17) the murdered individual was a disabled person and the defendant knew or should have known that the murdered individual was disabled. For purposes of this paragraph (17), "disabled person" means a person who suffers from a permanent physical or mental impairment resulting from disease, an injury, a functional disorder, or a congenital condition that renders the person incapable of adequately providing for his or her own health or personal care; or

(18) the murder was committed by reason of any person's activity as a community policing volunteer or to prevent any person from engaging in activity as a community policing volunteer; or

(19) the murdered individual was subject to an order of protection and the murder was committed by a person against whom the same order of protection was issued under the Illinois Domestic Violence Act of 1986 [750 ILCS 60/101 et seq.]; or

(20) the murdered individual was known by the defendant to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes.

(c) Consideration of factors in Aggravation and Mitigation.

The court shall consider, or shall instruct the jury to consider any aggravating and any mitigating factors which are relevant to the imposition of the death penalty. Aggravating factors may include but need not be limited to those factors set forth in subsection (b). Mitigating factors may include but need not be limited to the following:

(1) the defendant has no significant history of prior criminal activity;

(2) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;

(3) the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;

(4) the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;

(5) the defendant was not personally present during commission of the act or acts causing death.

(d) Separate sentencing hearing.

Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or mitigating factors as indicated in subsection (c). The proceeding shall be conducted:

(1) before the jury that determined the defendant's guilt; or

(2) before a jury impanelled for the purpose of the proceeding if:

A. the defendant was convicted upon a plea of guilty; or

B. the defendant was convicted after a trial before the court sitting without a jury; or

C. the court for good cause shown discharges the jury that determined the defendant's guilt; or

(3) before the court alone if the defendant waives a jury for the separate proceeding.

(e) Evidence and Argument.

During the proceeding any information relevant to any of the factors set forth in subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall

be given fair opportunity to rebut any information received at the hearing.

(f) Proof.

The burden of proof of establishing the existence of any of the factors set forth in subsection (b) is on the State and shall not be satisfied unless established beyond a reasonable doubt.

(g) Procedure—Jury.

If at the separate sentencing proceeding the jury finds that none of the factors set forth in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections [730 ILCS 5/5-1-1 et seq.]. If there is a unanimous finding by the jury that one or more of the factors set forth in subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections [730 ILCS 5/5-1-1 et seq.].

(h) Procedure—No Jury.

In a proceeding before the court alone, if the court finds that none of the factors found in subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections [730 ILCS 5/5-1-1 et seq.].

If the Court determines that one or more of the factors set forth in subsection (b) exists, the Court shall consider any aggravating and mitigating factors as indicated in subsection

(c). If the Court determines that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the Court shall sentence the defendant to death.

Unless the court finds that there are no mitigating factors sufficient to preclude the imposition of the sentence of death, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections [730 ILCS 5/5-1-1 et seq.].

(i) Appellate Procedure.

The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court.

(j) Disposition of reversed death sentence.

In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of first degree murder shall be sentenced by the court to a term of imprisonment under Chapter V of the Unified Code of Corrections [730 ILCS 5/5-1-1 et seq.].

ILLINOIS POST-CONVICTION HEARING ACT

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or of the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause the defendant to be brought before the court, and the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections [730 ILCS 5/5-1-1 et seq.].

Section (c) of the Illinois Post-Conviction Hearing Act, 725 Ill. Comp. Stat. Ann. 5/122-1 (as amended by P.A. 83-693, effective January 1, 1984), provides, in pertinent part:

> . . . No proceedings under this Article shall be commenced more than 6 months after the . . . issuance of the opinion from the Illinois Supreme Court or 6 months after the date of the order denying certiorari by the United States Supreme Court or the date for filing such a petition if none is filed or 10 years from the date of conviction, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

Section (c) of the Illinois Post-Conviction Hearing Act, 725 Ill. Comp. Stat. Ann. 5/122-1 (as amended by P.A. 87-580, effective January 1, 1992), provides, in pertinent part:

> . . . No proceedings under this Article shall be commenced more than 6 months after the . . . issuance of the opinion from the Illinois Supreme Court or 6 months after the date of the order denying certiorari by the United States Supreme Court or the date for filing such a petition if none is filed or 3 years from the date of conviction, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

The Illinois Post-Conviction Hearing Act, 725 Ill. Comp. Stat.Ann. 5/122-1 (as amended by P.A. 88-678, effective July 1, 1995), provides:

> Any person imprisoned in the penitentiary who asserts that in the (a) proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article.
>
> The proceeding shall be commenced by filing with the clerk of the (b) court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the State's Attorney by any of the methods provided in Rule 7 of the Supreme Court. The clerk shall docket the petition for consideration by the court pursuant to Section 122-2.1 upon his or her receipt thereof and bring the same promptly to the attention of the court.
>
> No proceedings under this Article shall be commenced more than 6 (c) months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.
>
> person seeking relief by filing a petition under this Section must (d) specify in the petition or its heading that it is filed under this Section. A trial court that has received a petition complaining of a conviction or sentence that fails to specify in the petition or its heading that it is filed under this Section need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article.

> A proceeding under this Article may not be commenced on behalf of (e) a defendant who has been sentenced to death without the written consent of the defendant, unless the defendant, because of a mental or physical condition, is incapable of asserting his or her own claim.

The Illinois Post-Conviction Hearing Act, 725 Ill. Comp. Stat. Ann. 5/122-6 (as amended by P.A. 88-678, effective July 1, 1995), provides, in pertinent part:

> Disposition in trial court. The trial court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

The Illinois Death Penalty Statute, 720 Ill. Comp. Stat. Ann. 5/9-1, is reproduced in the Appendix hereto at A-5.

(2)

No. 01-0026

Supreme Court, U.S.
FILED
AUG 24 2001
OFFICE OF THE CLERK

In the

Supreme Court of the United States

DAVID SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois
WILLIAM L. BROWERS
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601
Counsel for Respondent

RICHARD A. DEVINE
State's Attorney of Cook County
RENEE GOLDFARB
Counsel of Record
BARBARA L. JONES
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
Of Counsel

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

31 pp

QUESTIONS PRESENTED FOR REVIEW

Whether certiorari must not be granted where petitioner raises no new issue and where this Court has previously held that prosecutorial discretion to seek the death penalty does not violate the eighth and fourteenth amendments.

Whether certiorari need not be granted where the trial judge heard the evidence presented at petitioner's trial, both his sentencing hearings and his post-conviction hearing and stated that he was "quite familiar" with the issues of the post-conviction petition; whether petitioner's contention that clear standards are lacking is simply unfounded; whether the Illinois Supreme Court properly determined that no timeliness issue existed and whether the trial court properly dismissed petitioner's petition without an evidentiary hearing.

Whether certiorari need not be granted where the Illinois Supreme Court properly dismissed petitioner's claim of ineffective assistance of counsel under *Strickland v. Washington*.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PRAYER 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 13

I.

CERTIORARI MUST NOT BE GRANTED WHERE PETITIONER RAISES NO NEW ISSUE; THIS COURT HAS PREVIOUSLY HELD THAT PROSECUTORIAL DISCRETION TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS 13

II.

CERTIORARI NEED NOT BE GRANTED WHERE THE TRIAL JUDGE HEARD THE EVIDENCE PRESENTED AT PETITIONER'S TRIAL, BOTH HIS SENTENCING HEAR-

INGS AND HIS POST-CONVICTION HEARING AND STATED THAT HE WAS "QUITE FAMILIAR" WITH THE ISSUES OF THE POST-CONVICTION PETITION; PETITIONER'S CONTENTION THAT CLEAR STANDARDS ARE LACKING IS SIMPLY UNFOUNDED; THE ILLINOIS SUPREME COURT PROPERLY DETERMINED THAT NO TIMELINESS ISSUE EXISTED AND THAT THE TRIAL COURT PROPERLY DISMISSED PETITIONER'S PETITION WITHOUT AN EVIDENTIARY HEARING 17

III.

(Response to petitioner's Arguments III and IV)

CERTIORARI NEED NOT BE GRANTED WHERE THE ILLINOIS SUPREME COURT PROPERLY DISMISSED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND v. WASHINGTON* 20

CONCLUSION 27

TABLE OF AUTHORITIES

Cases: PAGE(S)

Albanese v. McGinnis, 823 F. Supp. 521 (N.D. Ill. 1993), *cert. denied*, 115 S.Ct. 1114 (1995) 16

Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525 (2000) 15, 16

Chrisman v. Miller, 197 U.S. 313, 25 S.Ct. 468 (1905) 25

Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950 (1976) 14, 15

People v. Bates, 124 Ill. 2d 81, 529 N.E.2d 227 (1988) 18

People v. Brisbon, 129 Ill. 2d 200, 544 N.E.2d 297 (1989), *cert. denied*, 494 U.S. 1074 (1990) 16, 17

People v. Coleman, 183 Ill. 2d 366, 701 N.E.2d 1063 (1998) 18

People v. Easley, 148 Ill. 2d 281, 592 N.E.2d 1036 (1992) 21

People v. Smith, 195 Ill. 2d 179, 745 N.E.2d 1194 (2000) ..... *passim*

People v. Stewart, 105 Ill. 2d 22, 473 N.E.2d 840 (1984), *cert. denied*, 112 S.Ct. 162 (1984) 17

People v. Towns, 182 Ill. 2d 491, 696 N.E.2d 1128 (1998) 22

Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991) 14

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) ..... *passim*

Watts v. Indiana, 338 U.S. 49, 69 S.Ct. 1347 (1949) 23, 24

Williams v. Chrans, 742 F. Supp. 472 (N.D. Ill. 1990), *cert. denied*, 505 U.S. 1208 (1992) 16

Constitutional Provisions Involved:

U.S. Const., Amend. V 2

U.S. Const., Amend. VI 2

U.S. Const., Amend. VIII 2

U.S. Const., Amend. XIV 2

Statute:

720 ILCS 5/9-1(d) 13, 14

PRAYER

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari to the Illinois Supreme Court be denied.

OPINIONS BELOW

On October 15, 1992, the Illinois Supreme Court affirmed petitioner's convictions but vacated his death sentence and remanded the cause for a new sentencing hearing based on the trial court's failure to "life-qualify" or "reverse-*Witherspoon*" the jury. *People v. Smith*, 152 Ill. 2d 229, 274, 604 N.E.2d 858 (1992) *(Smith, I)*. On February 9, 1994, petitioner waived his right to a jury for sentencing. (RS 46-7) On remand, the trial court reimposed the death penalty for petitioner's murder conviction and on March 20, 1997, the court affirmed petitioner's sentence of death. *People v. Smith*, 176 Ill. 2d 217, 680 N.E.2d 291 (1997) *(Smith, II)*. The Illinois Supreme Court thereafter affirmed the trial court's denial of petitioner's post-conviction petition in *People v. Smith,* 195 Ill. 2d 179, 745 N.E.2d 1194 (2000). (*Smith, III*).

JURISDICTION

Petitioner seeks discretionary review by means of certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

Procedural History

At the close of the evidence at petitioner's trial, a jury found petitioner guilty of first degree murder, aggravated criminal sexual assault and home invasion. On January 12, 1989, the jury found petitioner death eligible, found no mitigating factors sufficient to preclude the imposition of the death penalty and petitioner was sentenced to death. An automatic appeal to the Illinois

Supreme Court followed. On October 15, 1992, the Illinois Supreme Court affirmed petitioner's convictions but vacated his death sentence and remanded the cause for a new sentencing hearing based on the trial court's failure to "life-qualify" or "reverse-*Witherspoon*" the jury. (R. C197-226); *People v. Smith,* 152 Ill. 2d 229, 274, 604 N.E.2d 858 (1992).

The same judge, the Honorable Themis N. Karnezis presided over petitioner's second sentencing hearing. Petitioner signed a jury waiver, opting to have the judge determine his sentence. (R. 46-7) Petitioner was sentenced by the trial judge to death. (R. 464) The Illinois Supreme Court affirmed petitioner's death sentence. *People v. Smith*, 176 Ill. 2d. 217, 680 N.E.2d 291 (1997).

Petitioner filed his original petition for post-conviction relief on December 21, 1996 and his an amended petition on December 5, 1997. On September 11, 1998, the same judge who had presided over both of petitioner's sentencing hearings stated that he had reviewed all of the issues, that he was "quite familiar with them," and dismissed the post-conviction petition without an evidentiary hearing. The Illinois Supreme Court affirmed this dismissal of petitioner's petition in *People v. Smith,* 195 Ill. 2d 179, 745 N.E.2d 1194 (2000).

Facts Leading to Petitioner's Convictions and Sentence

On March 17, 1987, the victim, Lisa Ferguson, had been living with her aunt, Juanita Soto, at 3122 South Union in Chicago, for about one week. Also living at this address were Juanita's four-year old daughter, Sirena, Sirena's father, Carlos, and a friend, Edward Ramirez. (R. 83, 110)

On that date, Lisa agreed to babysit Sirena while Juanita met Carlos at a bar called Bucko's. (R. 87, 112) At Bucko's Bar, Juanita saw petitioner, who was a good friend of her husband's, Edward Ramirez and Ephraim Ramirez. Juanita had known petitioner for approximately ten years. Juanita arrived some time after 6 p.m. and had a brief conversation with petitioner, who was not slurring his words and did not appear intoxicated. (R. 87-8) Petitioner left the bar alone around 7:30 p.m. Shortly thereafter Edward and Ephraim left. Edward came back to the bar a bit after 8 p.m. and told Juanita and Carlos to go home because something bad had happened. (R. 89-90)

In the meantime, Lisa and Sirena were sitting on the sofa watching "The Wizard of Oz" and eating popcorn. (R. 112) Someone knocked on the door; when asked who was there, petitioner answered that he was "Dave." Petitioner had been to Sirena's house before and Sirena recognized petitioner's voice. Lisa told petitioner that she could not let him in and she returned to the couch with Sirena. (R. 115-6)

About an hour later, there was another knock at the door. The man behind the door said that he was Lisa's brother, Max, but when Lisa opened the door she saw that petitioner, and not Max, stood there. (R. 117-118) Sirena ran and hid underneath her bed. (R. 118) She heard Lisa screaming from the kitchen and then she heard petitioner say "shut-up." Sirena heard the silverware drawer open, heard the silverware rattling, and then there was silence. (R. 119) About five minutes later, while still under her bed, Sirena heard the bathroom water running.

At approximately 7:45 p.m., a next-door neighbor, Sharon Chandler, heard angry voices coming from Jua-

nita Soto's apartment. (R. 176) She heard a woman ask, "What do you want?" and a man scream, "Shut up, be quiet!" (R. 177) She heard scuffling noises as if furniture was being moved around. (R. 177) Ms. Chandler told them if they did not stop fighting that she would call the police. (R. 177) The man told her to shut up and then she once more heard the woman say "What do you want?" (R. 177) After the woman's ensuing scream abruptly stopped, Ms. Chandler called the police. (R. 177-78)

When Detectives McCann and Koclanis arrived at the crime scene about five minutes later, Lisa Ferguson was lying face-down on the kitchen floor with a large pool of blood by her head. (R. 193-194) A knife was alongside her head and her undergarments and jeans were pulled down and wrapped around one leg. Another knife was in the kitchen about ten feet away. A bowl of popcorn was knocked down from the kitchen table. The victim's body was smeared with blood and there were marks on the back of her legs and on her buttocks. A curling iron was lying between her legs in her buttocks area. (R. 194) A wire was on her leg. (R. 195)

A police officer took Sirena to a neighbor's house. (R. 120) When she saw her mother she said "mommy, mommy, Lisa died. Dave killed her." (R. 90, 121) The police asked Juanita if she knew anyone named "Dave." When she answered affirmatively, they asked her to show them where he lived. (R. 91) Officers Simon and Lukensmeyer, Lieutenant Vargas, Juanita Soto and Max Ferguson went to petitioner's apartment at 918 W. 31st Place. (R. 91, 181) Simon and Lukensmeyer walked through the gangway to the rear of the building and heard a man and woman arguing in the basement. (R. 183) The woman asked, "Where were you?" and the man responded that he was out. The man then said that he saw

someone killed that night and then he admitted, "I did it." (R. 184)

The police knocked at the door, announced their office and asked petitioner if he was David Smith. (R. 91, 185) He answered yes and was placed under arrest. (R. 185) Petitioner had changed his clothes since leaving the tavern. (R. 92)

Josephine Palomino, petitioner's girlfriend with whom he shared an apartment, allowed the police to look in the apartment. They found petitioner's blood-stained blue jeans and white thermal undershirt soaking in a wash basin. They then took petitioner to the police department. (R. 186)

Dr. Nancy Jones, an expert in forensic pathology, performed Lisa Ferguson's autopsy on March 18, 1987, and testified as to the extent of her injuries. At seventeen years old, Lisa weighed approximately 116 pounds and was five feet four and a half inches tall. Lisa suffered at least 29 blunt trauma injuries, three stab wounds, two incised wounds, and numerous bruises, abrasions, and hemorrhages to her head, face, neck, tongue, trachea, shoulder, chest, upper arms, knees, thighs, buttocks, and genitalia. (R. 62-65) The injuries to her neck region were the most significant. (R. 65) There were numerous abrasions and bruises around her eyes and pinpoint-like hemorrhages on her face. (R. 64) Lisa's abrasion on her upper chest, measuring five or six inches, appeared to be a brush or rug burn abrasion. (R. 65)

An area of redness at the very beginning of the vagina measured one-quarter of an inch. (R. 65) Lacerations and tears around the victim's rectal and anal area were consistent with forcible penetration with an object such as a curling iron. (R. 66, 70) The anus was loose and

gaping and some bloody fluid appeared just inside the anus. (R. 66)

The victim's burns were consistent with being dragged on the floor or on the carpet. (R. 79) Her facial abrasions were consistent with being struck with a fist or an object. (R. 80) Her sharp neck injuries were consistent with being either stabbed or slashed with a knife, and the cause of death was determined to be multiple stab wounds with strangulation a contributing factor. (R. 70-2)

Vaginal, oral and rectal swabs taken from the victim proved negative for the presence of spermatozoa and semen. (R. 220) Both the victim and petitioner shared the same blood, type A. (R. 222) The knives and petitioner's gym shoes contained blood, type A. (R. 223, 227)

Back at the police station, petitioner received *Miranda* warnings. Petitioner gave oral and written statements in which he admitted killing the victim. According to his statement, petitioner knew Lisa Ferguson for several years, but did not know that she was still in the neighborhood. He had been drinking before he went to the apartment at 3122 South Union with the purpose of burglarizing it. He wanted the VCR that he knew was inside. When Lisa answered the door, he decided not to go through with the burglary and told her that he was looking for BoBo. Lisa told him that BoBo was not there and petitioner left the apartment. He decided to return, intending to kill Lisa. When she opened the door, petitioner forced his way inside and grabbed her by the throat. He struggled with her near the bedroom entrance. The knife must have been on the kitchen counter when they were struggling in the kitchen. Petitioner stated "he was glad that she died because he didn't want

her to live remembering how bad he had beaten her." Petitioner first stated that he cut himself during the struggle, but corrected his statement with the assertion that he cut himself at work earlier in the day. (R. 196-99, 243-247) Interrogating officers noticed there was blood on petitioner's clothing and asked him to remove his pants. A large stain on petitioner's knee contained blood. (R. 200) Blood stained the inside of petitioner's underpants. (R. 201) Petitioner dressed and was placed in a lineup. Sirena viewed the lineup and identified petitioner. (R. 123, 202) Sirena told the police that it "was Dave who was there." (R. 130)

Twice, while petitioner was incarcerated, shanks were found in his cell. On June 15, 1988, at approximately 10:00 p.m., an officer recovered a shank with a rag wrapped around the handle from the air vent in petitioner's cell. (R. 171-2) Petitioner admitted that it was his. (R. 172)

On January 2, 1990, another officer found a six-inch long metal shank in a Folger's can during a routine shakedown of petitioner's cell. (R. 146) (R. 147-8) Petitioner was not present during the shakedown, but when he later saw the officer, he screamed that she was a "nosey bitch" and that he was "going to burn her, bitch." (R. 149) Petitioner subsequently received three months' segregation and was demoted to a "C" grade which included the loss of certain privileges. (R. 149-50)

On November 11, 1992, petitioner threw boiling water, smelling of urine, on Officer Upchurch's face, neck, shoulder and back. (R. 133-34, 136) Petitioner yelled at the officer to "stop walking around like a peacock" and that he was not as tough as he thought he was. (R. 134)

Officer Upchurch was later treated for his injuries at Pontiac Correctional Center Health Facility and then transported by ambulance to St. James Hospital in Pontiac. The left side of his face, ear, neck, shoulder and back were burned, requiring an overnight stay. (R. 135) Petitioner was charged with aggravated battery and a jury subsequently convicted him in November 1993. (R. 137-8)

Petitioner also threw boiling water at an inmate on May 14, 1992. On that day, the inmate yelled that his clothes were all wet. His arms were red and blisters were forming. It "looked like hot steam coming off some of his clothes too." (R. 159-60) The water originated from petitioner's cell. (R. 161) Petitioner boasted, "I got the last laugh." (R. 162) The inmate was hospitalized. (R. 162) Following a hearing on the assault of the inmate, petitioner received six months' segregation with his classification changed to "C." (R. 165)

Three witnesses testified in mitigation and the testimony of four witnesses from petitioner's first sentencing hearing were presented in mitigation by way of stipulation. One witness, Josephine Palomino, testified at both hearings. (R. 247)

Deputy sheriff and jail supervisor Timothy Martin recalled petitioner's good adjustment to institutionalized life in the county jail. Petitioner received free time out of his cell in exchange for his work duties. (Supp. R 202, 210) He also became a Christian and carried a Bible. (Supp. R. 205-6) Petitioner chose to associate with a group called the Neutrons rather than affiliate with a gang. (Supp. R. 207) Petitioner was polite, courteous and helpful. (Supp. R. 203)

Petitioner's brother, James Smith, provided a comprehensive account of petitioner's early life. Petitioner was one of eight children. (Supp. R. 246) His father was an alcoholic who did not spend a great deal of time with him. (Supp. R. 246-47, 258) After his parents separated, petitioner and his mother moved to Chicago where he saw his mother once a day for about an hour. (Supp. R. 250) Petitioner and James were sent to Arizona to live with their father and petitioner quarreled with his stepmother. (Supp. R. 253-4) At thirteen, petitioner began running away with his brother James, and the two boys stayed away from home for a couple of days at a time. (Supp. R. 256) By the time he entered high school, petitioner was using marijuana three times a week and stealing from department stores with his brother. (Supp. R. 257-8, 271-2)

James Smith described his own criminal background and admitted he had burglarized a Phoenix home and a surveillance trailer in Illinois. (Supp. R. 266-67) In this connection, he testified that he and petitioner "would steal most anything" from homes and stores when they lived together in Arizona. (Supp. R. 273)

Petitioner finally "got tired of it all" and left his father's home at fourteen. (Supp. R. 259) Petitioner stayed in Phoenix until he was arrested for shoplifting and placed in a halfway home for delinquents. (Supp. R. 259-60) At sixteen, petitioner moved to Oregon to live with another brother, but he later lived with his mother again in Chicago. (Supp. R. 259, 262) When James saw petitioner again in Chicago, petitioner's drug use included marijuana, LSD, angel dust, and uppers and downers. He also drank "pretty much." (Supp. R. 263-4)

Twenty-three year old Josephine Palomino, alternately described as petitioner's girlfriend and common-law

wife, met petitioner in 1985 and moved in with him six months later. (Supp. R. 280-81) At the time of the murder, she was living with petitioner for about ten months. (R. 250) Petitioner told her how he had lived on the streets and had used drugs heavily, including marijuana, cocaine, PCP, and heroin. (Supp. R. 282-83, 285, 288) Things went well for a while and the couple started saving money to get married (Supp. R. 287) but petitioner began spending less and less time at home. He finally admitted using drugs again. (Supp. R. 292)

Josephine became pregnant and as her pregnancy progressed, petitioner became more and more removed. (R. 252) They fought frequently and petitioner often came home intoxicated. (R. 253) Early in 1987, Josephine learned that petitioner owed money to drug dealers, and she borrowed $1000 to pay his debts. (Supp. R. 290-91)

At the time of the murder, Josephine was eight months pregnant. Her son was born in April of 1987, one month after Lisa Ferguson's murder. (Supp. R. 292, R. 252) Although Josephine only communicates with petitioner about their son, David, she feels that her son and petitioner have a very strong and necessary relationship. (R. 254) Josephine testified that petitioner has had a positive impact on her son as far as instilling in him the importance of school and family. (R. 255) She further testified that it would be devastating to her son if petitioner was put to death. (R. 256)

Josephine's mother, Rose, generally corroborated Josephine's account when she testified. Mrs. Palomino liked petitioner "instantly," and she was pleased when petitioner fixed the plumbing in her home and repaired a damp wall for her. "He was just a nice person." (Supp. R. 304-6)

Dr. Lawrence Heinrich, a clinical psychologist, interviewed petitioner once on September 3, 1993, six years after Lisa Ferguson's murder. (R. 274) He reviewed the police reports, the victim's post-mortem report, a social history report prepared by David Randall in 1989 and the public defender's appellate brief and spoke with Josephine and Rose Palomino. (R. 264) Dr. Heinrich administered a series of psychological tests on petitioner.

It was Dr. Heinrich's belief that petitioner had a borderline personality which is characterized by a lack of self-worth and excessive distrust. (R. 268) He felt that it was possible for this type of individual to have brief psychotic episodes under certain stressful conditions. (R. 269) He thought that petitioner fell within a psychological diagnostic category characterized by enormous difficulty in forming consistent interpersonal relationships, poor impulse control and substance abuse. (R. 270-273)

Dr. Heinrich admitted that the tests were very subjective and even the Million test, which is more objective, depends on petitioner. (R. 282) Dr. Heinrich believed that petitioner tended to exaggerate some of his symptoms. (R. 283) Petitioner never told the doctor about petitioner's drug use on the night he killed Lisa Ferguson. (R. 288) Dr. Heinrich felt that the scalding water and the shanks found in petitioner's prison cell were all attributed to living in an incarcerated setting. (R. 293-294) It was his opinion that petitioner was merely trying to protect himself. (R. 297)

Dr. George Savarese did a comprehensive psycho-social developmental history of petitioner. (R. 299) After a single interview with petitioner, he opined that petitioner had a borderline personality with some schizoid features. (R. 304)

Following closing arguments, the trial judge noted that this was an exceptionally brutal case. (R. 461) The court then held that there was insufficient mitigation, and that, after considering the facts of the case, petitioner's conduct subsequent to his arrest, and his convictions, the sentence of death was appropriate. (R. 464)

REASONS FOR DENYING THE WRIT

I.

CERTIORARI MUST NOT BE GRANTED WHERE PETITIONER RAISES NO NEW ISSUE; THIS COURT HAS PREVIOUSLY HELD THAT PROSECUTORIAL DISCRETION TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner first alleges that certiorari must be granted to decide the question whether a death penalty statute lacks clear objective criteria where the prosecutor is vested with total discretion in requesting a capital sentencing hearing. (Pet. Br. 14-15) No "arbitrary and capricious application" exists however where the prosecutor's objective consideration of the particularized circumstances of the individual offense and the individual offender are embedded in the Illinois Death Penalty Statute.

The prosecutor's role under Section 9-1(d) of the Illinois Death Penalty Statute is limited to that of initiating the proceedings:

> Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or

> mitigating factors as indicated in subsection (c). [720 ILCS 5/9-1(d)].

Petitioner's argument, that the Illinois Death Penalty Statute provides for arbitrary and capricious application, has been rejected outright many times. For instance, in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), this Court decided that a prosecutor's discretion to charge a capital offense and subsequently engage in plea bargaining did not result in the arbitrary imposition of the death penalty in violation of the Eight Amendment. Likewise, the Court in *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991), held that the Illinois Death Penalty Act does not violate the Eighth and Fourteenth Amendments even though the prosecutor has discretion to request a death penalty hearing. *Id.* at 993. The Court held that a prosecutor's decision under Section 9-1(d) of the Illinois statute to commence or forego a death sentence hearing is not a decision to "impose" the death sentence. Rather the prosecutor's role is limited to that of initiating the proceedings. *Id.*

Petitioner argues that because prosecutors are under no obligation to conform their approach to seeking death penalty sentencing hearings, whether to request such a hearing is dependent upon the "philosophy, policy or whim of the prosecutor in the county where a crime is committed." (Pet. Br. 15) The Court in *Silagy* took a contrary view:

> Indeed, rather than jeopardizing the integrity of the death sentencing procedure, we believe that the Illinois statute's grant of post-conviction discretion may enhance the quality of prosecutorial decisions in this regard in that it permits

> that prosecutor to weigh all of the evidence presented in the guilt/innocence stage of the proceedings in his assessment of the propriety of seeking the death penalty in that particular case. Thus, like the sentencing authority's ultimate decision to impose the death penalty, the prosecutor's preliminary decision to seek the death sentence in a particular case will be guided not only by the nature of the crime itself, but also by any individualized characteristics of the defendant which may come out during the course of the trial.

Moreover, simply because the Illinois Supreme Court adheres to long-established law governing the constitutionality of the statute does not mean that if, when presented with a viable argument, it would not review prior rulings. (*See* petitioner's cite to *People v. Smith,* 195 Ill. 2d 179, 208-9, 745 N.E.2d 1194 (2000), and claim that "the court has no intention of overruling its prior rulings on the constitutionality of this structure.") (Pet. Br. 15)

Petitioner acknowledges this Court's holding that a prosecutor's discretion in selecting cases to be prosecuted as capital cases is constitutional under the Eighth and Fourteenth Amendments. Petitioner contends nevertheless that the reasoning set forth in *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525 (2000) demonstrates that review on this question is merited. (Pet.'s Br. 17) Petitioner's premise, that "specific standards to ensure its equal application," are lacking in the Illinois Death Penalty Statute is faulty and has been rejected by this Court. (*Jurek v. Texas, supra.)*

This Court in *Bush* analyzed the "right to vote on equal terms" and held that the State may not, by later

arbitrary and disparate treatment, value one person's vote over another. *Bush*, 531 U.S. at 104-5. The specific question before this Court was whether the recount procedures adopted by the Florida Supreme Court are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate. *Id.* at 105. This Court found that Florida's basic command for the count of legally cast votes, that is, to "consider the intent of the voter," was "unobjectionable as an abstract proposition and a starting principle," but the problem lay in the absence of specific standards to ensure its equal application. *Id.*

Therein rests petitioner's misunderstanding both of *Bush* and established Illinois law in his analogy of this case to *Bush*. Petitioner's analogy might ring true if each and every one of the 102 counties in Illinois considered different factors in its determination of whether a defendant was death eligible. The prosecutors in Illinois, however, are limited to clear-cut, defined standards which ensure equal application.

To determine whether a defendant is death eligible, a prosecutor must first determine if a defendant, convicted of first degree murder, is over the age of 18. One of a series of aggravating factors must then apply. Every single prosecutor in the state of Illinois applies the identical standard in making a death eligible determination. *Bush* is therefore inapplicable to the instant case. Prosecutorial discretion to seek the death penalty does not violate the Fourteenth Amendment due process clause or the Eight Amendment prohibition against arbitrary sentences. *Albanese v. McGinnis*, 823 F. Supp. 521 (N.D. Ill. 1993), *cert. denied*, 115 S.Ct. 1114 (1995); *Williams v. Chrans*, 742 F. Supp. 472 (N.D. Ill. 1990), *cert. denied*, 505 U.S. 1208 (1992); *People v. Brisbon*, 129 Ill. 2d 200,

544 N.E.2d 297 (1989), *cert. denied,* 494 U.S. 1074 (1990); *People v. Stewart,* 105 Ill. 2d 22, 473 N.E.2d 840 (1984), *cert. denied,* 112 S.Ct. 162 (1984).

Petitioner finally alleges that this prosecutorial discretion is not subject to judicial review. (Pet. Br. 20) To the contrary, petitioner's own counsel raised the issue of whether his trial counsel was ineffective for failing to challenge the court's death eligibility finding. Simply because our supreme court disagreed with petitioner does not indicate that there was no review.

Petitioner has given this Court no novel reason upon which to grant a writ of certiorari. It has been decided many times that a prosecutor's discretion in initiating the capital sentencing hearings does not violate the Eighth and Fourteenth Amendments. Therefore, the People of the State of Illinois respectfully request that this Honorable Court deny petitioner's petition for certiorari.

II.

CERTIORARI NEED NOT BE GRANTED WHERE THE TRIAL JUDGE HEARD THE EVIDENCE PRESENTED AT PETITIONER'S TRIAL, BOTH HIS SENTENCING HEARINGS AND HIS POST-CONVICTION HEARING AND STATED THAT HE WAS "QUITE FAMILIAR" WITH THE ISSUES OF THE POST-CONVICTION PETITION; PETITIONER'S CONTENTION THAT CLEAR STANDARDS ARE LACKING IS SIMPLY UNFOUNDED; THE ILLINOIS SUPREME COURT PROPERLY DETERMINED THAT NO TIMELINESS ISSUE EXISTED AND THAT THE TRIAL COURT PROPERLY DISMISSED PETITIONER'S PETITION WITHOUT AN EVIDENTIARY HEARING.

Petitioner next contends that this Court should grant a writ of certiorari to establish clear standards for the

process due under post-conviction proceedings in which constitutional claims have been raised. (Pet. Br. 20) Petitioner bases this argument on his unfounded contention that the circuit court did not consider whether he established grounds for an evidentiary hearing before dismissing his petition without an evidentiary hearing. This contention is not supported by facts in the record and soundly fails where the Illinois circuit court and supreme court applied long-established state law in reviewing, and denying, petitioner's post-conviction petition. Standards for reviewing constitutional claims are clearly delineated in Illinois and petitioner's petition seeking a writ must be denied.

On appeal from a first-stage dismissal of a post-conviction petition, the Court's review is plenary. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998). "The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the [Post-Conviction Hearing] Act." *Id.* 183 Ill. 2d at 388. The statute of limitations applicable to the filing of petitioner's post-conviction petition was the statute that was in effect at the time he filed his petition. *People v. Bates*, 124 Ill. 2d 81, 85-86, 529 N.E.2d 227 (1988).

Petitioner argues that the circuit court never considered his post-conviction claims. He contends that the trial court did not consider whether he established grounds for an evidentiary hearing before dismissing his petition without an evidentiary hearing. (Pet. Br. 20) This argument was wholly discarded by the Illinois Supreme Court, and, upon a review of the record, unsupportable.

The judge who presided over petitioner's post-conviction hearing was no novice to petitioner's case. The Honorable Themis N. Karnezis presided over petitioner's trial, his original sentencing hearing, his second sentencing hearing and over the post-conviction hearing. Before dismissing petitioner's post-conviction hearing without an evidentiary hearing, the judge stated that he had "reviewed all the issues." In an understatement, he continued, "I am quite familiar with them." (R. C4) The court initially stated that the claims were either waived or *res judicata*, before adding that "furthermore" the claims from the guilt/innocence phase were improperly before it. Therefore, petitioner's allegation that the court "did not even consider whether petitioner established grounds before dismissing the post-conviction petition" is erroneous. (Pet. Br. 21) The Illinois Supreme Court applied a *de novo* review and affirmed the circuit court's dismissal of petitioner's petition.

In their brief before the Illinois Supreme Court, the People argued that the issue of timeliness was irrelevant where the circuit court did indeed review petitioner's claims. The Illinois Supreme Court properly determined that the issue of whether petitioner's petition was timely filed was a non-issue and proceeded to address petitioner's substantive issues. *People v. Smith,* 195 Ill. 2d 179, 187, 745 N.E.2d 1194 (2000).

The Illinois Supreme Court held that "in determining whether to grant an evidentiary hearing, all well-pled facts in the petition and any accompanying affidavits are taken as true." *Smith,* 195 Ill. 2d at 187. An evidentiary hearing is warranted only where the allegations of the post-conviction petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional

rights have been violated." *Id.* Clear standards for the process due under post-conviction proceedings in which constitutional claims are raised are firmly rooted in Illinois law. No need exists for this Court to clarify that which was scrupulously applied in the instant case.

Petitioner's argument to this Court, that he was denied the trial court's full consideration of the post-conviction petition and the parties arguments in the first instance, as previously made, and rejected, by the Illinois Supreme Court. The circuit court considered and rejected petitioner's claims and therefore the issue of whether the petition was timely filed was irrelevant. A unanimous Illinois Supreme Court declined to address the timeliness issue; a unanimous Illinois Supreme Court reviewed the remaining issues raised by petitioner and held that the circuit court properly dismissed petitioner's post-conviction petition without an evidentiary hearing. Petitioner is simply rehashing a factual analysis not adopted by our state supreme court. The People of the State of Illinois respectfully request that this Honorable Court deny petitioner's petition for a writ of certiorari.

III.

(Response to petitioner's Arguments III and IV)

CERTIORARI NEED NOT BE GRANTED WHERE THE ILLINOIS SUPREME COURT PROPERLY DISMISSED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND v. WASHINGTON*.

Petitioner next alleges that this Court should grant certiorari to review the decision made by the Illinois Supreme Court that his counsel was effective during his

trial and his sentencing hearing. (Pet. Br. 24-30) This issue, dismissed by the Illinois Supreme Court after a careful review of the facts, under the standards set forth by this Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), is improper for certiorari review.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), this Honorable Court established the standard by which claims of ineffective assistance of counsel claims are to be measured. To be successful on such a claim, the defendant must show both that (1) counsel's performance was so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms and (2) that the deficient performance so prejudiced the defense as to deny the defendant a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *People v. Easley*, 148 Ill. 2d 281, 592 N.E.2d 1036, 1062-1063 (1992).

If the conclusion is reached that the defendant did not suffer prejudice as a consequence of counsel's actions, then there is no need to determine separately whether counsel's performance was in fact deficient. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. With respect to the prejudice component of the test, *Strickland* advises, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

In his petition for writ of certiorari, petitioner makes the identical claims that he made before the Illinois Su-

preme Court. The supreme court reviewed petitioner's claims and found that he failed to establish ineffective assistance of counsel under either *Strickland* prong. Petitioner has offered no rational argument upon which this Court should grant certiorari.

Petitioner argued then and argues now that his counsel was ineffective in presenting his motion to suppress a statement that he gave at police headquarters on the night of March 17, 1987, in which he confessed to the murder of Lisa Ferguson. *People v. Smith,* 195 Ill. 2d 179, 189, 745 N.E.2d 1194 (2000). The Illinois Supreme Court held that since the testimony upon which petitioner relied was part of the record on direct appeal, it was waived. (*People v. Towns,* 182 Ill. 2d 491, 502-503, 696 N.E.2d 1128 (1998)). However, since the petitioner contended that his appellate counsel was ineffective for failing to raise the issue, the supreme court reviewed it.

Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *Smith,* 195 Ill. 2d at 190. "A defendant who contends that appellate counsel rendered ineffective assistance, e.g., by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that the decision prejudiced the defendant. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *Id.*

Petitioner argues that the testimony of Rose Palomino should have been introduced at the suppression hearing

to prove that petitioner had been yelling at the police station. (Pet. Br. at 25)

In denying this claim, the Illinois Supreme Court quoted the trial court in its holding that even assuming that "loud voices were raised," such evidence did not satisfy petitioner's burden of proof to show that his statement was not freely given. *Id.* The Illinois Supreme Court likewise examined petitioner's claim that he could not have knowingly and intelligently waived his *Miranda* rights due to his alleged PCP intake and held that petitioner received effective assistance of counsel. *Smith,* at 192.

The Illinois Supreme Court reviewed, and rejected, petitioner's claim that his trial counsel was ineffective for failing to suppress his statement, "I did it," overheard by the police. *Id.* at 194-195. The court held:

> In light of the fact that this was not a closely balanced case, we conclude that there is no reasonable probability that the outcome of defendant's trial could have been different had the challenged statement never been admitted. Therefore, we find that defendant suffered no prejudice as a result of the claimed error. [*Id.*]

Petitioner makes the *identical* argument here. Petitioner is asking this Court to reevaluate the facts and reexamine the finding of the Illinois Supreme Court. This is not an argument fit for this Court. *See, Watts v. Indiana,* 338 U.S. 49, 50, 69 S.Ct. 1347 (1949) (On review here of state convictions, all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court.)

Petitioner also contended to the Illinois Supreme Court, and contends to this Court, that his counsel failed to present certain mitigating evidence that he was under the influence of PCP at the time of the murder and aggravating criminal sexual assault. (Pet. Br. 27) In support of this contention, petitioner attached three affidavits from friends who were celebrating with him the night of the crimes. Petitioner claims that these "occurrence witnesses" could have testified about petitioner's PCP use. (Pet. Br. 28) The Illinois Supreme Court held that not one of these affidavits mitigated petitioner's conduct, nor suggested any constitutional violation. The court held:

> There was simply not enough evidence to support a defense of voluntary intoxication. Any evidence with regard to defendant's intoxication is speculative and inconclusive. In fact, the majority of the evidence tends to show that defendant was not intoxicated when he committed the murder. [*Smith,* 195 Ill. 2d at 197.]

Regarding the use of these friends' testimony at the sentencing hearing, the Illinois Supreme Court likewise discarded this claim, holding that "even if the judge had heard the additional evidence from defendant's friends, there is no reasonable probability that the result of defendant's sentencing would have been different." *Smith,* at 203. Petitioner asks this Court to overrule a factual analysis previously made by our state court. He has not, accordingly, presented this Court with any reason upon which to grant certiorari. *Watts v. Indiana,* 388 U.S. at 50.

Petitioner also claims that his counsel was ineffective for failing to demonstrate his "extreme emotional and

mental disturbance" through drug abuse evidence. (Pet. Br. 27-28) To this contention, the Illinois Supreme Court held that the testimony petitioner claims is lacking would have been cumulative and therefore there was no reasonable probability that the result of petitioner's sentencing hearing would have differed. *Smith*, 195 Ill. 2d at 203. Petitioner failed to show prejudice under *Strickland.*

Petitioner also claims that his counsel was ineffective for failing to present a "complete picture of tumultuous and abusive upbringing." (Pet. Br. 29) When considering this identical issue, the Illinois Supreme Court held, "We disagree with defendant's contention that his trial counsel failed to present complete picture of defendant's upbringing." *Smith*, at 204. Because of this "disagreement" between petitioner and the supreme court, petitioner argues to this Court that the supreme court misapplied the *Strickland* standard. (Pet. Br. 30) The Illinois Supreme Court properly applied the *Strickland* standard and held that defendant failed to meet it. Reevaluating the facts is not the rationale for granting certiorari. *Chrisman v. Miller,* 197 U.S. 313, 25 S.Ct. 468, 469 (1905) ("In cases coming from a state court, we do not review questions of fact, but accept the conclusions of the state tribunals as final.")

Petitioner also contends that his constitutional rights were violated when his appointed counsel failed to rebut aggravating evidence of his conduct while incarcerated at Pontiac Correctional Center. (Pet. Br. 30) Petitioner argues that correctional officers who were familiar with him would have testified as to his "peaceable and law-abiding conduct and nature" while incarcerated. The Illinois Supreme Court held that this proffered evidence was cumulative, would not have altered the outcome,

and therefore his counsel was not ineffective for failing to present this evidence. *Smith* at 207.

Further, the Illinois Supreme Court looked to evidence presented in aggravation, including the horrid recounting of the crimes, so brutal that petitioner was "glad" that Lisa had died because he "didn't want her to live remembering how bad he had beaten her." *Smith,* 195 Ill. 2d at 208. The court recounted that the victim suffered at least 29 blunt trauma injuries, three stab wounds, two incised wounds, and numerous bruises, abrasions, and hemorrhages, and anal injuries consistent with forcible penetration. *Id.*

The supreme court noted that the trial court had called this case an "exceptionally brutal case," and related that it could not remember a case where the facts were more aggravating. *Id.* The supreme court held that petitioner failed to make a substantial showing that his constitutional rights were violated. *Id.*

To find counsel ineffective, petitioner must show resulting prejudice. The Illinois Supreme Court properly rejected petitioner's arguments of ineffective assistance of counsel under *Strickland*. There is no need for this Court to grant certiorari merely to rehash the facts. Petitioner's challenges are unworthy of certiorari review. Therefore, the People of the State of Illinois respectfully request that this Honorable Court deny petitioner's writ of certiorari.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois
WILLIAM L. BROWERS
Assistant Attorney General
100 West Randolph Street
Suite 1200
Chicago, Illinois 60601

Counsel for Respondent

RICHARD A. DEVINE
State's Attorney of Cook County
RENEE GOLDFARB
Counsel of Record
BARBARA L. JONES
Assistant State's Attorneys
309 Richard J. Daley Center
Chicago, Illinois 60602
(312) 443-5496
Of Counsel